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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 77

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, PETITIONER

vs.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, AMIT K. KADRIE, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED MAY 3, 1930
CERTIORARI GRANTED JUNE 3, 1930

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1 [Captions omitted.]

2 In Supreme Court of the District of Columbia

At law

No. 74168

UNITED STATES OF AMERICA ex Rel. MARY I. KADRIE, EVELINA Kadrie, Amit K. Kadrie, Bertha Kadrie, Mailivan E. Kadrie, Marie Kadrie, Dorothy Kadrie, Elmer Kadrie, and Omar Kadrie, by Their Next Friend, Mother, and Natural Guardian, Sarah Kadrie, Plaintiffs,

vs.

HUBERT WORK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF the United States, Defendant

Petition for Writ of Mandamus

Filed October 17, 1927

Come now the relators, Mary I. Kadrie, Evelina Kadrie, Amit K. Kadrie, Marie Kadrie, Dorothy Kadrie, Elmer Kadrie, and Omar Kadrie, by their next friend, mother, and natural guardian, Sarah Kadrie, and show unto the court:

1. That relators are the minor children of Sarah Kadrie, the daughter of Mary Blair, a full-blood member of the White Earth Band of Chippewa Indians in Minnesota, duly enrolled as such on the original census rolls made by the United States commissioners under the authority contained in the act of January 14, 1889, and the agreements entered into thereunder and approved by the President on March 4, 1890, as a basis for the allotment of lands to the Chippewa Indians of Minnesota and for the distribution of the trust funds of said Indians, are citizens of the United States and reside in the city of St. Paul, State of Minnesota.

2. Defendant, Hubert Work, is a citizen of the United States, Secretary of the Department of the Interior of the United States, and resides in the District of Columbia.

3. That under the authority contained in the act approved January 14, 1889 (25 Stat. at L. 642) all the different bands
3 or tribes of Chippewa Indians in the State of Minnesota entered into agreements with the United States whereby they ceded to the United States under an express trust all of the lands and timber thereon embraced in their then existing tribal or band reservations in the State of Minnesota, except sufficient land to be reserved on the Red Lake Reservation to make allotments of land to the then members of the Red Lake Band belonging on that reserva-

tion, and sufficient land to be reserved on the White Earth Reservation to make allotments of land to all the other Indians then members of said different bands or tribes, and with the further provision that any of said members of said bands or tribes, exclusive of the members of the Red Lake Band residing on any of the ceded reservations could, in his or her discretion, take his or her allotment in severalty on the reservation where he or she lived at the time the Indians were removed to the White Earth Reservation. The agreements provided for the preparation of complete rolls of the then members of each band or tribe, for the purpose of determining whether the requisite number of Indians gave their assent to the cessions and as a basis for the allotments and money payments, said rolls to be made before the agreements were signed; for the removal, as soon as said rolls were prepared and the cessions completed, of all the Indians, exclusive of the members of the Red Lake Band, to the White Earth Reservation to be there allotted land when they had established their residence thereon, except those who desired to take their allotments on the reservation where they were then living, who were accorded that privilege; for the classification of all the ceded lands as either "agricultural" or "pine" land; for the disposition of the "agricultural" lands under the homestead laws at $1.25 per acre; for the estimation and appraisal of the timber on the lands classified as "pine" land and for the sale of the pine land and timber thereon at public auction at not less than the appraised value thereof, the valuation of the timber to be at not less than $3.00 per thousand feet. The agreements (section 7) then contained express and detailed instructions governing the receipt and distribution of the net proceeds received from all the ceded lands and timber thereon, the persons to whom the money was to be paid, and the time and manner of making the payments in the following language:

"Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid

in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."

The agreements were duly executed and on March 4, 1890, approved by the President of the United States (H. R. Ex. Doc. 247, 51st Cong., 1st sess.) and as expressly declared in said act of January 14, 1889, thereupon "took effect."

4. Thereafter all the members of the various bands or tribes, exclusive of the Red Lake Band, were either removed to the White Earth Reservation and there established their residence on and were allotted land, or were permitted to take their allotments out of the ceded lands of the land upon which they had previously resided. Mary Blair, grandmother of relators, a full-blood Chippewa Indian and a recognized and enrolled member of the White Earth Band established her residence upon and was allotted land on the White Earth Reservation out of the lands reserved thereon for allotment purposes. All of the lands reserved for allotment purposes on the White Earth Reservation has long since been allotted, more than 95 per cent of the allotted lands sold, and all the Indians now residing within the territory set aside for allotment purposes are citizens of the State of Minnesota and subject to its laws to the same extent as are all other citizens; substantially all of the ceded lands have long since been sold or disposed of and there is not now and has not for many years existed any reservation among the Chippewa Indians in Minnesota, except a reservation created exclusively for the members of the Red Lake Band by subsequent acts of Congress, nor has there since March 4, 1890, existed any form of Indian band or tribal government among the Chippewa Indians of Minnesota.

5. Following the approval of the averments by the President on March 4, 1890, the Department of the Interior did not pay one-half of the interest annually accruing on the principal fund per stirpes and to the heads of families as the agreements directed, but distributed the same per capita. As a basis for said interest payments to the lineal issue thereafter born of the originally enrolled and allotted parents and as a basis for the ultimate division of the principal fund, the agents of the United States prepared supplemental rolls upon which were inscribed the names of all children born to enrolled and allotted parents and their issue irrespective of where said children were born, all in conformity with section 7 of said agreements. In the year 1892, there was born to Mary Blair in lawful wedlock, a child, Sarah Cogger, mother of relators, who was, following the established practice enrolled on said supplemented

rolls and whose name has ever since remained upon said rolls, and who has at all times since her said enrollment received her per capita share of all money payments thereafter made.

6. Sarah Cogger being a citizen of the United States, during the year 1909 was united in lawful wedlock with Mall Kadrie, a
6 naturalized citizen of the United States, as a result of which union there were born to Sarah Kadrie (née Cogger) in lawful wedlock the following-named children, relators herein, on the following dates and at the following places:

Names.	Dates of birth.	Place of birth.
Mary I. Kadrie	1/10/10	Canada.
Evelina "	5/11/11	Canada.
Amit K. "	3/30/14	Canada.
Bertha "	3/31/16	Canada.
Mailivan E. "	3/31/18	International Falls, Minn.
Marie "	9/ 9/20	" " "
Dorothy "	8/29/22	" " "
Elmer "	1/ 5/25	" " "
Omar "	2/ 9/27	St. Paul, Minnesota.

all of which minor children, relators herein, are now in being and reside with their mother, Sarah Kadrie. Following the respective births of relators, Mary I. Kadrie, Evelina Kadrie, and Amit K. Kadrie, their names were inscribed upon said money payment rolls by the officers and agents of the United States pursuant to the uniform practice that then and theretofore had uniformly prevailed of enrolling on the money payment rolls the lineal issue (children, grandchildren, etc.) of the originally enrolled and allotted ancestors.

7. In or about the year 1916, the Indian agent located at White Earth in charge of said supplemental rolls recommended to the Indian Bureau that the names of a large number of children and grandchildren of originally enrolled and allotted parents and grandparents whose names had been inscribed upon said supplemental rolls be stricken therefrom on the stated ground that by section 324 of the regulations of the Indian Office promulgated in 1904, no child was entitled to enrollment unless said child had been born a member of the tribe or band, was recognized by the tribe or band as belonging thereto, and had been identified and had affiliated with the tribe or band. The Indian Bureau unmindful of the fact that said regulation related exclusively to tribal Indians residing upon tribal reservations and had no application to the rights of the lineal issue
7 of the originally enrolled and allotted Chippewa Indians whose rights in the trust estate, were governed exclusively by section 7 of said trust agreements, approved the recommendations of the superintendent and directed that the names of said children be stricken from said supplemental rolls. Among the children whose names were thus stricken from said supplemental rolls were the

names of relators, Mary I. Kadrie, Evelina Kadrie, and Amit K. Kadrie, by order of the Indian Bureau issued August 18, 1917. Thereafter, Sarah Kadrie, mother of relators, Mary I., Evelina, and Amit K. Kadrie, petitioned the Secretary of the Interior for a revocation of said order of the Indian Bureau dated August 18, 1917, as did also the Indian ancestors of the other children whose names had been stricken from said supplemental rolls by orders of the Indian Bureau. The question presented for decision by each of the separate petitions being identical or substantially identical, the petition filed by Sarah Kadrie on behalf of her minor children was selected as a test case and referred to the then solicitor for the department for an opinion determinative of their rights. The matter was thoroughly considered by the solicitor, who, on February 17, 1919, rendered an elaborate opinion in which he held that all issue, lineal descendants, whether children or grandchildren of the originally enrolled and allotted parents or ancestors were entitled under section 7 of the agreements to participate equally in the distribution of all money payments; that said children or grandchildren took an interest in said funds, not as tribal members, but as of the ancestor's blood. In passing upon the rights of relators, May I., Evelina, and Amit K. Kadrie, to share in said money payments, the solicitor said:

"In the particular case giving rise to a call for this opinion Sarah Kadrie, née Cogger, was a full-blood Chippewa Indian woman born on the reservation in the year 1892—subsequent to the cession and the original enrollment. She was an only child of her mother, a member of the original enrollment. As such she is entitled to participate for herself in the annuities, and that right is accorded to her. She married in 1909 Mall Kadrie, a native of Syria, and since then has resided with him mainly in Canada, but for a short time in Syria—and at no time on the reservation, although occasionally visiting it. There have been born of said marriage four children, the oldest now about nine years of age. Her three oldest children were for some years enrolled among the Chippewa Indians, and she was paid annuities for them until the year 1917, when by direction of the Indian Bureau their names were stricken from the roll and the annuities withheld. At the same time the enrollment of the youngest child was refused.

"In my opinion this action was erroneous and should be corrected. Sarah Kadrie and her children are 'issue' of her mother a full-blood Chippewa Indian duly enrolled, and as such they will be entitled at the expiration of the trust period to share in the distribution of the trust fund, and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited either by acquiring foreign citizenship or by abandoning or failing to acquire residence on the Indian reservation or with the tribe."

Following said decision the action theretofore taken by the Indian Bureau in striking the names of all of said Indian children from

the supplemental rolls was rescinded and their names, including the names of Mary I., Evelina, and Amit K. Kadrie were restored to said rolls. In conformity with the uniform practice that had at all times theretofore prevailed in the preparation of said supplemental rolls, and expressly affirmed in said opinion of February 17, 1919, the names of relators, Bertha, Mailivan E., Marie, Dorothy, Elmer, and Omar Kadrie, were following their respective births duly and regularly placed upon said supplemental rolls, and all of relators have at all times since their respective births received their per capita shares of all money payments made from said trust funds and have been recognized by the department at all times prior to October 1, 1927, as entitled to equal distributive shares in all money payments.

8. On January 8, 1927, the present Solicitor for the Department of the Interior rendered an opinion in the case of Jane B.
9 Andrews, applicant for enrollment on said supplemental rolls, in which the prior opinion of February 17, 1919, was expressly overruled, the said opinion of January 8, 1927, holding in effect that the lineal issue of those Chippewa Indians in Minnesota whose names appear upon the rolls prepared under the agreements entered into pursuant to the authority contained in the act of January 14, 1889, were not entitled to enrollment on said supplemental rolls or entitled to participate in the per capita distribution of the trust funds unless they were born to membership in the tribe or band, had lived and affiliated with the tribe or band, and had been recognized by the band or tribe as members thereof. The ruling contained in said opinion of January 8, 1927, was a complete reversal of the established practice of the Government officers in the preparation of said supplemental rolls, and would if carried into effect result in the striking of the names from said supplemental rolls of substantially every child, grandchild, or great grandchild born since March 4, 1890, to or descendants of originally enrolled and allotted parents or ancestors, as there has existed no band or tribal Indian government among the Chippewa Indians in Minnesota, no reservation upon which any child could have been born to membership in any band or tribe and no way by which any such child could have affiliated with any band or tribe or could have sustained tribal relations since March 4, 1890, many of the allotments selected out of the ceded lands being scattered throughout an area approximately two hundred miles square, and more than sixty per cent of the originally enrolled and allotted Indians having long since disposed of their allotments and removed to and located in various parts of the United States, far removed from their original and ceded reservations. The originally enrolled and allotted Chippewa Indians protested against the carrying into execution of said opinion of January 8, 1927, on the ground that it was not a true and proper construction of section 7 of said agreements and deprived their children and grandchildren of their lawful shares in said estate. In order that the question might be

definitely and finally determined and to avoid a multiplicity of
10 suits on April 19, 1927, citation was issued upon Sarah Kadrie,
next friend, mother and natural guardian of relators, requiring
her to show cause why the names of relators should not be stricken
from the supplemental rolls. Thereafter and in due course Sarah
Kadrie, next friend, mother, and natural guardian of relators, made
answer thereto, the allegations of fact contained in said answer being
the same as the allegations contained in this bill, and, further, the
power of the Secretary to reopen and reconsider the rights of relators
was challenged on the ground that they had been previously adjudi-
cated upon the same facts and law applicable thereto and finally
determined and that said rights were not subject to the changing and
vacillating views and opinions of succeeding solicitors and secre-
taries of the department. On October 1, 1927, the Secretary of the
Interior, without authority or right so to do, and upon the same
conceded facts and law applicable thereto that were before the
solicitor when the decision of February 17, 1919, was rendered, struck
the names of relators from said supplemental rolls and directed the
subordinate officers of the department to make proper notation
thereof on their records, as set out in the decision of the Secretary
rendered October 1, 1927, as follows:

"The answer of Mrs. Sarah Kadrie to the citation to show cause why the names of her minor children should not be stricken from the tribal rolls of the Chippewa Indians of Minnesota, which answer was submitted informally to the department and acknowledged by your office on August 29, 1927, has been given consideration in connection with the record in the case.

From a consideration of all the facts in this case, which are not being recited but are contained in the record, it is clear that these children were never entitled to enrollment and should never have been enrolled with the Chippewa Indians of Minnesota following the rule laid down by the United States Circuit Court of Appeals in the case of Julia B. Oakes et al. *v.* United States (172 Fed. Rep. 305) and the practice of the department prior to the Mahaffie opinion of
February 17, 1919. Therefore the names of Mary I., Evelina,
11 Amit K., Bertha, Mailivan E., Marie, Dorothy, Elmer, and
Omar Kadrie are hereby stricken from the rolls of the Chip-
pewa Indians of Minnesota. You will make proper notation on the records of your office.

9. Relators represent that the Julia B. Oakes case cited by the Secretary as the basis for his decision of October 1, 1927, and the action taken thereunder, was fully considered by the Solicitor in his opinion of February 17, 1919, and therein correctly held to have no application to the rights of relators, as the only question presented in that case for decision, which the court had jurisdiction to determine, related exclusively to the right to an allotment of land conferred upon the original enrollees, which was separate and distinct from a right to share in the division of the trust funds conferred

upon the issue thereafter born of the original enrollees, the right to an allotment of land being dependent upon both (1), membership in one of the bands or tribes at the time the agreements were executed as provided in section 1, and (2) removal to and residence upon the land to be allotted, unless the Indian selected his allotment out of the ceded lands where he or she was then residing, in which event residence without removal was required, as provided in section 3, while section 7 conferred an absolute right to an equal distributive share of the funds upon the issue of the original enrollees who were in being when the distributions occurred, without any requirement of residence or membership in a band or tribe. Relators further represent that they are the lineal issue of their grandmother, who was a full-blood member of the White Earth Band of Chippewa Indians in Minnesota and duly and lawfully enrolled and allotted as such, which is conceded by the defendant; that relators were duly and lawfully enrolled on said supplemental rolls in conformity with section 7 of said agreements and in conformity with the established practice which has prevailed ever since said agreements were approved March 4, 1890 and over a period of 37 years; that their right to said enrollment was duly put in issue and expressly determined by the Solicitor in his decision of February 17, 1919, and that having once been finally determined, their rights were not subject to further inquiry by the department; that they can not be made
12 subject to the changing and vacillating views and opinions of succeeding solicitors and secretaries of the department entertaining a different view of the law applicable to the same facts; that their enrollments were in conformity with the letter and spirit of section 7 of said agreements and that the defendant, Hubert Work, finding and conceding that they are the lawful issue of a duly enrolled and allotted ancestor, had no lawful authority to issue the said order of October 1, 1927, striking their names from said rolls and had no lawful authority to carry said order into execution; that his act in so doing was beyond his lawful authority and is null and void, but that said void order operates and will continue to operate to prevent relators from receiving their lawful distributive shares in the more than ten million dollars yet to be distributed of the estate of the Chippewa Indians of Minnesota.

Wherefore plaintiffs pray:

1. That a rule issue directed to Hubert Work, Secretary of the Interior, directing him to show cause, on a day certain to be therein named, if any he may have, why a writ of mandamus should not issue commanding him to restore or cause to be restored the names of each of the relators on the supplemental rolls of the Chippewa Indians of Minnesota and to pay them their per capita shares in all future money payments that may be made under the authority contained in section 7 of said agreements approved March 4, 1890.

Plaintiffs further pray for such other and further relief in the premises as to the court may seem just and proper.

SARAH KADRIE,
Next Friend, Mother and Natural Guardian of Plaintiffs.

WEBSTER BALLINGER,
Attorney for Plaintiffs.

[Duly sworn to by Sarah Kadrie jurat omitted in printing.]

13 In the Supreme Court of the District of Columbia

Response to the Rule to Show Cause

Filed October 28, 1927

* * * * * * *

Now comes Hubert Work, Secretary of the Interior of the United States of America, and having been duly served with a copy of the petition for a writ of mandamus filed herein on October 17, 1927, together with a Rule to Show Cause why such writ should not be issued directing the respondent to restore the names of each of the petitioners to the supplemental rolls of the Chippewa Indians of Minnesota, by way of response thereto shows to the Court:

1. That he admits the relators are the minor children of Sarah Kadrie, who brings this suit as their next friend, mother, and natural guardian, and who is the daughter of Mary Blair, a full-blood member of the White Earth Band of Chippewa Indians in Minnesota, duly enrolled as alleged, and that the relators are each citizens of the United States and now reside in St. Paul, Minnesota.

2. That defendant resides in the District of Columbia, is Secretary of the Interior, and a citizen of the United States.

3. That he admits substantially the material allegations of paragraph 3 of the petition.

4. That without being bound as to the complete verity thereof, which he deems immaterial, he admits the allegations of paragraph 4 of the petition for the purposes of this response, except the allegation that "there is not now and has not for many years existed any reservation among the Chippewa Indians in Minnesota, except
14 a reservation created exclusively for the members of the Red Lake Band by subsequent acts of Congress, nor has there since March 4, 1890, existed any form of Indian Band or Tribal Government among the Chippewa Indians of Minnesota," which allegation he expressly denies.

5. That he denies the allegations of paragraph 5 of the petition, except that he admits the birth, enrollment, and payment of a per capita share of annuity payments to Sarah Cogger now Kadrie, mother of relators, and that she was and now is entitled to be so enrolled and to receive such payments.

6. That he admits the marriage of Sarah Cogger now Kadrie, mother of relators, as alleged, and the names, ages, and places of birth of her children, as alleged in paragraph 6 of the petition. He further admits the enrollment of the three relators named therein upon said money payment rolls, but denies that it was "pursuant to the uniform practice that then and theretofore had uniformly prevailed," and especially denies that such practice of "enrolling on the money payment rolls the lineal issue (children, grandchildren, etc.) of originally enrolled and allotted ancestors" at that time or at any time prior to February 17, 1919, prevailed in the Department of the Interior.

Further answering said paragraph, defendant alleges that the names of said relators among a few others, were erroneously placed upon said rolls under the belief and upon a showing to the Commissioner of Indian Affairs that they were for various other alleged reasons, under some of the various acts of Congress entitled thereto, which reasons when analyzed by the rules laid down in the opinion of the United States Circuit Court of Appeals for the Eighth Circuit in the case of Oakes v. United States (172 Fed. 305), decided August 2, 1909, did not entitle them to such enrollment and participation in said fund because they were born away from the Indian reservation, tribal relation, and under conditions showing that their parents had abandoned the habits and customs of their Indian tribesmen and adopted those of civilized life.

7. That he admits that during the years 1916 and 1917 a number of enrollees upon the supplemental Chippewa annuity rolls, including the three named in paragraph 7 of the petition were for good cause shown, and upon a finding that they were not entitled to remain thereon, stricken and dropped therefrom, and that thereafter following the Mahaffie opinion referred to in said paragraph, they were duly restored and have since until October 1, 1927, drawn annuities.

Further answering the allegations of paragraph 7, defendant denies that lineal issue of originally enrolled and allotted Chippewa Indians, as such, have any right to be enrolled or to participate in tribal funds or other property under the act of 1889 (25 Stat. 642), or under any other act of Congress or under any regulation of the Indian Office, or otherwise, but that in order for any such lineal descendant to be so entitled, he must be recognized and permitted such benefits by an express act of Congress.

That original paragraph 4 of section 324 of the regulations of the Indian Office as promulgated in 1904, under the act of June 7, 1897 (30 Stat. 90), read as follows:

All children born to annuitants since the last preceding payment will be enrolled with their parents: Provided, That a child born to an Indian woman as the result of a marriage with a white man contracted after June 7, 1897, is not entitled to annuities or other benefits

accruing to the tribe and must not be enrolled. (25 Stats. 392; 30 Stats. 90.)

That such regulations were amended on April 1, 1906, by striking out the above paragraph 4 and substituting therefor the following:

All children born to annuitants either before or since the last preceding payment, who have not already been enrolled, should be enrolled with their parents. This includes cases where the mother is an Indian woman married to a white man, and such woman and her issue are recognized by the tribe as belonging thereto, and where the family so founded identifies itself and affiliates with the tribe of which the mother is a recognized member. When an Indian woman by her marriage with a white man has, in effect, withdrawn from the tribe and is no longer identified with the tribal community and interests, the offspring of such marriage are not entitled
16 to share in annuities or other benefits as Indians and must not be enrolled. (Op. Asst. Att'y-Gen'l. Int. Dept., Mar. 14, 1905; I. O. Let. 21245–1905.)

That thereupon and on June 30, 1905, instructions were promulgated by the Indian Office and sent to agents and superintendents interested therein as follows:

The said amendment, No. 6, as will be seen, contains three governing conditions, which must be met before enrollment can be made of children born to Indian women married to white men:

1. The women must be recognized by the tribe as belonging thereto.
2. The child must be recognized by the tribe as belonging thereto.
3. The family so founded must be identified and affiliated with the tribe of which the mother is a recognized member.

The third or last sentence of amendment No. 6, which reads:

When an Indian woman by her marriage with a white man has, in effect, withdrawn from the tribe and is no longer identified with the tribal community and interests, the offspring of such a marriage are not entitled to share annuities or other benefits as Indians and must not be enrolled, is simply the negative corollary of what precedes, and has no further bearing other than as amplifying the instructions which it follows.

That under the act of 1888 (25 Stat. 399), only the tribal Indian woman who intermarried with the white man was involved. By the act of 1897 (30 Stat. 90), the children of such a marriage consummated prior to the passage thereof were recognized, within the limitations of said act, but the relators, children of a marriage consummated subsequently to the passage thereof, are not entitled to its benefits, and no act of Congress broad enough to permit the enrollment of children born in Canada and even in Minnesota and under the circumstances set forth herein has been enacted.

8. That he denies the allegations of paragraph 8 excepting such thereof as are herein specifically admitted.

17 Further answering the allegations of said paragraph, defendant alleges that at all times prior to February 17, 1919,

and subsequent to January 8, 1927, it was, and is, the practice and policy of the Indian Office, with defendant's approval, to disregard mere blood relationship in determining who is entitled to participate in the fund in controversy herein, and the fact alone that an applicant is the child, grandchild, or other relation of a tribal Chippewa Indian, was not during such periods recognized as a proper basis for the enrollment of any applicant. During the intervening period, but erroneously as he now believes, the names of relators and others were placed upon such rolls and paid annuities, in pursuance of the evident meaning of the said Mahaffie opinion; immediately, however, upon reaching a conclusion, on or about January 8, 1927, that such opinion was not well founded, the former policy was resumed and of those enrollees found by him to be erroneously upon such annuity rolls, the names of the relators were stricken therefrom. That in such action he alleges he was performing his official duty by protecting the rights, the property, and the money of the Chippewa Tribe, and particularly those individual members thereof whose rights to such money and property was thereby diminished and in part defeated.

Further answering the allegations of said paragraph, defendant expressly denies that "there has existed no band or tribal Indian government among the Chippewa Indians in Minnesota, no reservation upon which any child could have been born to membership in any band or tribe and no way by which any such child could have affiliated with any band or tribe or could have sustained tribal relations since March 4, 1890."

He further expressly denies that "the originally enrolled and allotted Chippewa Indians protested against the carrying into execution of said opinion of January 8, 1927, on the ground that it was not a true and proper construction of section 7 of said agreements and deprived their children and grandchildren of their lawful shares in said estate."

He admits the issuance of a citation to Sarah Kadrie, mother of relators, requiring her to show cause why relators' names
18 should not be stricken from said rolls, that she answered the same and that as a result of a due and proper hearing, and a due, proper, and lawful exercise of his official judgment, discretion, and authority, based thereon, the names of relators were stricken as heretofore set forth in this response.

9. That paragraph 9 of the petition contains conclusions both of law and fact as to which defendant is advised he need neither affirm nor deny. The opinions and decisions therein commented upon speak for themselves, and are subject to judicial notice. The relationship of relators to their mother and grandmother have already been admitted herein. Said relators having been erroneously enrolled for a long period of time have thereby each acquired a large sum of tribal money which obviously did not belong to them, and which in justice and equity they should be required to replace in said tribal fund. For the erroneous disbursement thereof the United States

may be legally liable to said tribe; to continue to permit the further erroneous disbursement after having arrived at a bona fide judgment and conclusion, based upon competent and authorized legal counsel and advice, that to continue to do so is wrongful, would be a gross violation of his duty as an officer of the United States Government, charged with supervising Indian moneys and property.

10. That by way of further response to the rule to show cause defendant alleges that all and singular the allegations of the petition do not constitute any proper grounds of granting a writ of mandamus as prayed. All of the acts of which complaint is made therein were performed in the exercise of defendant's official judgment and discretion, were neither arbitrary nor capricious, were wholly within the purview of defendant's lawful official duty and when incorporated in the judgment of such quasi-judicial officer are not subject to attack in a court but are final and conclusive upon the relators.

11. That the fund involved herein is the property of "the Chippewa Indians of Minnesota," a class of persons designated and described as "all the Chippewa Indians in the State of Minnesota" in an agreement or agreements duly entered into with the United States, pursuant to the act of January 14, 1889 (25 Stat. 642), by the terms of which plaintiffs as such class became and are entitled to the sole and exclusive beneficial interest in and to the trust thereby
19 created, and are duly recognized by Congress and the courts as having the power to prosecute claims against the United States, to employ counsel, and generally to transact business arising under the terms and provisions of said act. "The Chippewa Indians of Minnesota" is, therefore, an indispensable party to this suit, as the effect of granting the relief sought will be to deprive said Indians of a portion of such fund and to diminish the respective portion to be hereafter paid to each individual member thereof under the terms, provisions, and conditions set forth in said act.

12. That under the allegations of the petition the court has no jurisdiction to grant the relief thereby sought.

Wherefore, having made due response to the rule to show cause and having fully answered the allegations of the petition, defendant prays:

1. That the rule be discharged for the reasons shown herein.

2. That the bill be dismissed and plaintiffs awarded nothing; that defendant be permitted to go hence with all his costs herein laid out and expended.

HUBERT WORK,
Secretary of the Interior.

E. O. PATTERSON,
Solicitor, Department of Interior;
O. H. GRAVES,
Assistant to the Solicitor;
PEYTON GORDON,
United States Attorney,
Attorneys for Defendant.

[illegible] sworn to by Hubert Work, jurat omitted in printing.

20 In Supreme Court of District of Columbia

Memorandum

Filed March 29, 1928

* * * * * * *

On the whole I am inclined to agree with the opinion of the solicitor of the department in the Patterson opinion, and therefore the petition will be dismissed. I am influenced also by the fact that the Secretary of the Interior has a wide discretion in determining questions of law as well as of fact.

BAILEY, *J.*

In Supreme Court of District of Columbia

Decree

Filed April 12, 1928

* * * * * * *

On January 2, 1928, the above-named cause came regularly on for trial before this court, both parties being present by counsel of record. Said cause was submitted to the court upon the bill of complaint, response to the rule to show cause, replication and joinder in issue, together with a stipulation covering certain facts, and evidence in addition thereto, and the court having duly considered the same, heard the argument of counsel and being fully advised in the premises, finds the issues in favor of defendant and against the plaintiffs.

It is, therefore, ordered, adjudged, and decreed by the court on this 12th day of April, 1928, that plaintiffs take nothing herein and that defendant recover his costs, for which let execution issue.

JENNINGS BAILEY,
Justice.

In Supreme Court of District of Columbia

Note of Appeal

From the foregoing final decree the plaintiffs note an appeal in open court to the Court of Appeals of the District of Columbia; whereupon, the maximum of an undertaking for
21 costs only is hereby fixed in the sum of $100 with leave to deposit $50 cash with the clerk in lieu thereof.

JENNINGS BAILEY,
Justice.

O. K. as to form.
WEBSTER BALLINGER,
Attorney for Plaintiffs.

In Supreme Court of District of Columbia

Memorandum

April 12, 1928.—Undertaking for costs on appeal approved and filed.

In Supreme Court of the District of Columbia

Order making bill of exceptions part of record

APRIL 25, 1928.

Session resumed pursuant to adjournment, Mr. Justice Bailey, presiding.

* * * * * * *

Come now the plaintiffs by their attorney of record and submit to the court their bill of exceptions taken at the trial of this cause, and thereupon the court, after signing said bill of exceptions, orders the same made of record now for then.

In Supreme Court of District of Columbia

Assignment of errors

Filed April 25, 1928

* * * * * * *

1. The court erred in holding that the defendant had a wide discretion in determining the rights of relators to share in the trust fund and the annual interest accruing thereon, and was not bound by the plain language of the agreements creating the fund and defining the rights of those entitled to share therein.

2. The court erred in holding that the agreements entered into under the authority contained in the act of January 14, 1889, did not terminate the theretofore existing Indian band or tribal governments, and did not invest the issue of the Indians enrolled and alloted by the commission with a right to an equal distributive
22 share of the trust funds and the interest annually accruing thereon.

3. The court erred in holding that the construction in 1890 of section 7 of the act of January 14, 1889, embodied in said agreements and adhered to in practice until January 8, 1927, under which relators and all other issue of the originally enrolled and allotted Indians were enrolled and accorded equal distributive shares in the division of the trust fund and all interest annually accruing thereon, and under which the greater portion of said trust fund has been disbursed, was not a correct construction of said section and could be reversed and a new rule promulgated by the defendant 37 years imposing new and additional requirements as a basis of a right to share in the division of the remaining funds.

4. The court erred in holding that the departmental decision of February 17, 1919, was not res judicata.

5. The court erred in holding that the act of April 14, 1924, (43 Stats. at L., 95), was not a legislative confirmation of the departmental decision of February 17, 1919.

6. The court erred in holding that the rights of relators to share per capita in the remainder of the trust fund created by the agreements entered into under the authority contained in the act of January 14, 1889 (25 Stats., 642), and in the distribution of the interest annually accruing thereon, were dependent upon birth upon a tribal reservation, tribal recognition, and tribal affiliations.

7. The court erred in holding that the decision in Oakes et al. v. United States, 172 Fed. 305, was determinative of the rights of relators.

8. The court erred in refusing to grant the writ of mandamus as prayed and in dismissing relator's petition.

9. The court erred in including in the bill of exceptions the objections and exceptions taken by consent for defendant to the admission of evidence and the rulings of the court, the costs of which should be taxed against defendant.

WEBSTER BALLINGER,
Attorney for Plaintiffs.

23 Service of a copy of the foregoing assignment of error is hereby acknowledged this 23rd day of April, 1928.

O. H. GRAVES,
Attorney for Defendant.

In Supreme Court of District of Columbia

Designation of record

Filed April 25, 1928

* * * * * * *

The plaintiffs, having duly entered and perfected an appeal from the final decree entered in the above-entitled cause on the 12th day of April, 1928, designates the proceedings enumerated below to constitute the record on said appeal and requests the clerk of the court to prepare a transcript of the record for the Court of Appeals in accordance with such designation:

1. Plaintiffs' petition.
2. Defendant's answer.
3. Opinion of the court.
4. Judgment entered April 12, 1928.
5. Notation of bond approved and filed.
6. Statement of the evidence.
7. Assignment of errors.
8. This designation.

WEBSTER BALLINGER,
Attorney for Plaintiffs.

Service of a copy of the foregoing designation of record on appeal is hereby acknowledged this 17 day of April, 1928.

O. H. GRAVES,
Attorney for Defendant.

[Clerk's certificate to foregoing transcript omitted in printing.]

24 In Supreme Court of the District of Columbia

No. 4780

At law

No. 74168

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE ET AL., BY THEIR Next Friend, Mother, and Natural Guardian, Sarah Kadrie, plaintiffs

vs.

HUBERT WORK, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF the United States, defendant

Bill of exceptions

Caption

Be it remembered that the above-entitled cause duly came on for hearing before the Honorable Jennings Bailey, associate justice of the Supreme Court of the District of Columbia, on the 3rd day of January, 1928, Webster Ballinger, Esquire, appearing for the plaintiffs, and O. H. Graves, Esquire, appearing for the defendant, and thereupon the following proceedings were had, to wit:

Offers in evidence

Plaintiffs offered in evidence the following stipulation signed by counsel for the respective parties. Thereupon counsel for de-
25 fendant objected to the introduction of any evidence on the following grounds: (1) That the court had no authority to determine any question of fact; that the action of the defendant to which complaint is made was the result of the exercise of his official judgment and discretion, entirely within the scope of his official duty, is not subject to attack in the court, and is final and conclusive on plaintiffs, as will more particularly appear from the bill and answer; that the tendered facts set out in said stipulation were incompetent, irrelevant, and immaterial to the issues of law presented by the pleadings. Which objections were separately overruled by the court and defendant separately noted exceptions to said rulings. Thereupon the stipulation covering a part of the facts was admitted in evidence, said stipulation being as follows:

"It is stipulated by counsel for the respective parties to the above-entitled cause that the following facts, subject to any valid objections as to materiality, are correct:

"1. That relators are the minor children of Sarah Kadrie, the daughter of Mary Blair, a full-blood member of the White Earth Band of Chippewa Indians in Minnesota, duly enrolled as such on the original census rolls made by the United States commissioners under the authority contained in the act of January 14, 1889, and the agreements entered into thereunder and approved by the President on March 4, 1890, are citizens of the United States and reside in the city of St. Paul, State of Minnesota.

"2. Defendant, Hubert Work, is a citizen of the United States, Secretary of the Interior of the United States and resides in the District of Columbia.

"3. That the Act approved January 14, 1189 (25 Stat. at L., 642), provides, sections 1 and 3, as follows:

"Section 1. That the President of the United States is hereby authorized and directed within sixty days after the passage of this act, to designate and appoint three commissioners, one of whom shall be a citizen of Minnesota, whose duty it shall be, as soon as possible after their appointment, to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the
26 complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except that White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated; and such cession and relinquishment shall be deemed sufficient as to each of said several reservations, except as to the Red Lake Reservation, if made and assented to in writing by two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to such reservations; and as to the Red Lake Reservation the cession and relinquishment shall be deemed sufficient if made and assented to in like manner by two-thirds of the male adults of all the Chippewa Indians in Minnesota; and provided that all agreements therefor shall be approved by the President of the United States before taking effect: Provided further, That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior. And for the purpose of ascertaining whether the proper number of Indians yield and give their assent as aforesaid, and for the purpose of making the allotments and payments hereinafter mentioned, the said commissioners shall, while engaged in securing such cession and relinquishment as afore-

said and before completing the same, make an accurate census of each tribe or band, classifying them into male and female adults, and male and female minors; and the minors into those who are orphans and those who are not orphans, giving the exact number of each class, and making such census in duplicate lists, one of which shall be filed with the Secretary of the Interior, and the other with the official head of the band or tribe; and the acceptance and approval of such cession and relinquishment by the President of the United States shall, be deemed full and ample proof of the assent of
27 the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided.

Section 3. That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified, as specified in section one of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation, in conformity with the act of February 8, 1887, entitled "An act for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"; and all allotments heretofore made to any of said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act: Provided, however, That the amount heretofore allotted to any Indian on White Earth Reservation shall be deducted from the amount of allotment to which he or she is entitled under this act: Provided further, That any of the Indians residing on any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth Reservation."

Sections four, five and six of said act directed the classification of all the ceded lands as either "agricultural" or "pine" land; the disposition of the "agricultural" lands under the homestead laws at $1.25 per acre; the estimation and appraisal of the timber on the lands classified as "pine" land and for the sale of the pine land and timber thereon at public auction at not less than the appraised value thereof, the valuation of the timber to be at not less than $3.00 per thousand feet. Section seven provided:

28 "Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals in this act provided, be

placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."

The report (H. R. Rep. No. 789, 50th Cong., 1st sess.) of the House Committee on Indian Affairs on the bill that became the said act of January 14, 1889, contains the following statement:

"The bill is in the nature of a proposal to the Indians, and if not accepted by them is inoperative and nugatory. If accepted and assented to by at least two-thirds of the male adults of each band, the bill, if passed, becomes effective. In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens, to allot ample land to each of them in severalty, to dispose of the residue of the lands—the pine lands for the
29 highest possible figure, the agricultural lands at $1.00 per acre to actual settlers under the homestead laws—and to give all the Indians the entire benefit of the proceeds of the lands, less the necessary expenses, attending their survey, appraisal, and disposal. As to details the bill speaks for itself and is believed by your committee, fully and fairly, in a just and practical measure, to carry out the design of the general plan outlined as hereinbefore described."

The agreements were duly entered into, executed, and on March 4, 1890, approved by the President of the United States (H. R. Ex. Doc. 247, 51st Cong. 1st Sess.), and as expressly declared in said act of January 14, 1889, thereupon "took effect."

4. After the execution and approval of said agreements all the members of the various bands and tribes, exclusive of the Red Lake Band, were either removed to the White Earth Reservation where they established their residence and were allotted land, or were permitted to take their allotments out of the ceded lands which were a part of the reservation upon which they had previously resided. Mary Blair, grandmother of relators, a mixed-blood Chippewa Indian and a recognized and enrolled member of the White Earth Band, established her residence upon and was allotted land out of the la[illegible]

reserved for allotment purposes on the White Earth Reservation. All of the lands reserved for allotment purposes on the White Earth Reservation were allotted under said act and agreements.

5. In the year 1892, there was born unto Mary Blair at Richwood, Minnesota, in lawful wedlock, a child, Sarah Cogger, now Sarah Kadrie, mother of relators, who was enrolled on said rolls of the Chippewa Indians in Minnesota as provided by the act of January 14, 1889 and said agreements approved March 4, 1890, and her name has ever since remained upon said rolls and she has at all times subsequent thereto received a per capita share of all money payments thereafter made.

6. The act approved June 21, 1906 (34 Stats. at L. p. 351) contained the following provision:

"That all restrictions as to sale, incumbrance, or taxation for allotments within the White Earth Reservation in the State of Minnesota, now or hereafter held by adult mixed-blood Indians, are hereby removed, and the trust deeds heretofore or hereafter executed by the department or such allotments are hereby declared to pass the title in fee simple, or such mixed bloods upon application shall be entitled to receive a patent in fee simple for such allotments; and as to full bloods, said restrictions shall be removed when the Secretary of the Interior is satisfied that said adult full-blood Indians are competent to handle their own affairs, and in such case the Secretary of the Interior shall issue to such Indian allottee a patent in fee simple upon application."

7. Sarah Cogger then a citizen of the United States, and during the year 1909 was united in lawful wedlock with Mall Kadrie, a naturalized citizen of the United States, as a result of which union there were born to Sarah Kadrie (nee Cogger), in lawful wedlock, the following-named children, relators herein, on the following dates and at the following places:

Name	Date of birth	Place of birth
Mary I. Kadrie	1/10/10	Canada.
Evelina "	5/11/11	"
Amit K. "	3/30/14	"
Bertha "	3/31/16	"
Mailivan E. "	3/31/18	International Falls, Minn.
Marie "	9/ 9/20	" " "
Dorothy "	8/29/22	" " "
Elmer "	1/ 5/25	" " "
Omar "	2/ 9/27	St. Paul, Minn.

All of which minor children, relators herein, are now in being and reside with their mother, Sarah Kadrie. Following the respective births of relators, Mary I. Kadrie, Evelina Kadrie, and Amit K. Kadrie, their names were inscribed upon said money payment rolls by the officers and agents of the United States.

7a. Following the birth of the relator, Bertha Kadrie, named above, application for her enrollment at White Earth Agency, was

made to the Commissioner of Indian Affairs on July 11, 1916, by her said mother, and on July 20, 1916, said application was
31 referred to the Superintendent of the White Earth Agency for proper investigation and report and on July 28, 1916, the said Superintendent adressed the following letter to the Commissioner of Indian Affairs, to wit:

WHITE EARTH AGENCY,
White Earth, Minn., July 28, 1916.

COMMISSIONER OF INDIAN AFFAIRS,
Washington, D. C.

SIR:.

Referring to the copy of office letter dated July 20, 1916, addressed to Mrs. Sarah Kadrie, of Winnipeg, Manitoba, Canada, regarding her application for enrollment of her child four months old, not named, referred to me for investigation and report, I have to report that the records at this office, together with other information obtained, shows that Mrs. Sarah Kadrie, is a 3/8 of Indian blood, married to a white man, and left the reservation several years ago. Her child was born in the city of Winnipeg, Manitoba, Canada, among the white people.

Mrs. Sarah Kadrie is one and the — person who made a claim for back annuities due Eveline Kadrie and disallowed in the office letter "Cl. No. 281653–64153–16, C. C. B.," dated June 24, 1916, for the reason that the child was born of a white father away from the White Earth Reservation, and that the parents have not lived among or affiliated with the Indians of the said reservation since its birth.

In view of the facts as stated above, I respectfully recommend that Mrs. Sarah Kadrie's application for enrollment of her child, four months old, with the White Earth Chippewa Indians be denied in accordance with paragrph 324 of the regulations of the Indian Office, 1904.

Very respectfully,

J. H. HINTON, *Superintendent.*

32 In answer instructions were given said Superintendent in Indian Office reply dated August 2, 1916, as follows:

Aug. 2, 1916.

MR. JOHN H. HINTON,
Supt. White Earth Indian School.

MY DEAR MR. HINTON:

This office is in receipt of your letter of July 28, 1916, with respect to the application of Mrs. Sarah Kadrie, of Winnipeg, Manitoba, Canada, for the enrollment of her infant child with the Indians of the reservation under your charge.

From your letter it appears that the said mother is a three-eighths-blood Chippewa of the White Earth Reservation, who, upon her marriage to a white man several years ago, voluntarily left her people, and that the child in question was born in the city of Winnipeg among the whites. Under the ruling of the department in such c

the child would not be entitled to enrollment and should be denied, following the instructions contained in paragraph 324 of the regulations of the Indian Office, 1904, and amendments thereto.

Please advise Mrs. Kadrie of the finding of the office in the case.

Very truly yours,

(Signed) C. F. HAUKE,
Chief Clerk.

8. There was included in the Indian appropriation bill approved June 7, 1897 (30 Stat. 90), the following general provision of law:

"That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior act of Congress shall be construed as to debar such child of such right."

33 Under said act the department issued a regulation known as paragraph 4 of Section 324 of the Regulations of the Indian Office, which was promulgated in 1904 and reads as follows:

"All children born to annuitants since the last preceding payment will be enrolled with their parents: *Provided*, That a child born to an Indian woman as the result of a marriage with a white man contracted after June 7, 1897, is not entitled to annuities or other benefits accruing to the tribe and must not be enrolled (25 Stats. 392; 30 Stats. 90)."

That such regulations were amended April 1, 1905 (Amendment No. 6) by striking out the above paragraph and substituting the following therefor:

"All children born to annuitants either before or since the last preceding payment, who have not already been enrolled, should be enrolled with their parents. This includes cases where the mother is an Indian woman married to a white man, and such woman and her issue are recognized by the tribe as belonging thereto, and where the family so founded identifies itself and affiliates with the tribe of which the mother is a recognized member. When an Indian woman by her marriage with a white man has, in effect, withdrawn from the tribe and is no longer identified with the tribal community and interests, the offspring of such a marriage are not entitled to share in annuities or other benefits as Indians and must not be enrolled."

Thereupon and on June 30, 1905, instructions were promulgated by the Indian Bureau as follows:

"The said amendment, No. 6, as will be seen, contains three governing conditions, which must be met before enrollment can be made of children born to Indian women married to white men:

1. The woman must be recognized by the tribe as belonging thereto.
2. The child must be recognized by the tribe as belonging thereto.

34 3. The family so founded must be identified and affiliated

The third or last sentence of amendment No. 6, which reads:

When an Indian woman by her marriage with a white man has, in effect, withdrawn from the tribe and is no longer identified with the tribal community and interests, the offspring of such a marriage are not entitled to share annuities or other benefits as Indians and must not be enrolled—is simply the negative corollary of what precedes, and has no further bearing other than as amplifying the instructions which it follows."

9. On May 21, 1909, the United States Circuit Court of Appeals, Eighth Circuit, rendered an opinion in the case entitled Oakes et al. *v.* United States, reported in 172 Fed. 305, which is made a part hereof by reference. In or about the year 1916, the Indian agent located at White Earth and in charge of said rolls recommended to the Indian Bureau that the names of a number of children and grandchildren of originally enrolled and allotted parents and grandparents whose names had been inscribed upon said rolls be stricken therefrom on the stated ground that under said regulations promulgated in 1904, as amended in 1905, the instructions of the Indian Office thereunder, and the opinion of the Circuit Court of Appeals in the case entitled Oakes et al. *v.* United States, reported in 172 titled to have their names on said rolls and to receive distributive shares of the money payments from the trust estate as they had not been born to membership in the tribe, had not affiliated with and been recognized in the tribe as members thereof. The Indian Bureau concurred in the recommendations of the agent and directed that the names of said children be stricken from said rolls. Among the children whose names were thus stricken from said rolls were the names of relators, Mary I., Evelina, and Amit K. Kadrie. Thereafter, Sarah Kadrie, mother, natural guardian, and next friend of relators, Mary I., Evelina, and Amit K. Kadrie, petitioned the
35 Secretary of the Interior for a revocation of the order of the Indian Bureau under which the names of her minor children, Mary I., Evelina, and Amit K. Kadrie, had been stricken from said rolls. Similar petitions were filed by the Indian parents, or ancestors, of other children whose names had been stricken from said rolls by like orders of the Indian Bureau. The question presented for decision by each of the separate petitions being identical or substantially identical, the petition filed by Sarah Kadrie on behalf of her minor children was selected as a test case and was referred to the then Solicitor for the department for an opinion determinative of their rights. On February 17, 1919, the Solicitor rendered an opinion which was in the words and figures set out in Exhibit "A" hereto, which is made a part hereof. Following said opinion, the action theretofore taken by the Indian Bureau in striking the names of all of said Indian children from said rolls was rescinded and their names, including the names of Mary I., Evelina, and Amit K. Kadrie, were restored to said rolls, and following said opinion the names of relators, Bertha, Mailivan E., Marie, Dorothy, Elmer, and Omar Kadrie, were upon their respective births and the submission of

proof that they were the children of Sarah Kadrie, placed upon said rolls, and all of relators have at all times since their respective births received their per capita shares of all money payments made from said trust fund, and were recognized by the department prior to October 1, 1927, as entitled to equal distributive shares in all money payments.

10. The act approved April 14, 1924 (43 Stats. at L. 95), provided as follows:

"That the Secretary of the Interior be, and he is hereby, authorized to pay, out of any moneys belonging to the Chippewa Indians of Minnesota, such amounts as he may find due any persons of Chippewa blood whose names may have been erroneously omitted or stricken from the Chippewa annuity rolls, or who have been or may hereafter be found entitled to enrollment for annuity payments authorized by section 7 of the act of Congress approved January 14, 1889 (25 Stats. at L., page 642): Provided, That any moneys
36 found due and paid to any Indian under the provisions of this act shall not be subject to any lien or claim of attorneys or other parties."

The report of the Committee on Indian Affairs on the above act approved April 14, 1924, was as follows:

House of Representatives, 68th Congress, 1st Session

Report No. 62

Payment of claims of Chippewa Indians of Minnesota for back annuities

January 18, 1924.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. Snyder, from the Committee on Indian Affairs, submitted the following report (to accompany H. R. 2876):

The Committee on Indian Affairs, to whom was referred the bill (H. R. 2876) to provide for the payment of claims of Chippewa Indians of Minnesota for back annuities, having considered the same, report thereon with a recommendation that it do pass without amendment.

There are a number of Indians who have claims which can not be paid under existing law and it is hoped by your committee that this bill may be enacted at an early date.

This legislation meets the approbation of the Department of the Interior, as well as your committee, as evidenced by the letter of the Secretary of the Interior attached hereto and made a part of this report.

DEPARTMENT OF THE INTERIOR,
Washington, December 5, 1923.

Hon. HOMER P. SNYDER,
Chairman Committee on Indian Affairs,
House of Representatives.

MY DEAR MR. SNYDER:

There is inclosed herewith the draft of legislation for the purpose of authorizing the payment of back annuity claims of certain Chippewa Indians of Minnesota.

37 Within the last several years a number of persons have been enrolled with these Indians, some of whom were no doubt entitled to share in annuity payments made to the tribe before they were enrolled. Under existing law this department does not consider that it is authorized to pay such claims from the permanent trust fund of the tribe, and there is no other available fund belonging to the Indians from which such claim could be paid. It is therefore recommended that the bill be enacted.

This matter was the subject of House bill No. 9411 in the Sixty-seventh Congress, second session, upon which favorable report was made to you by this department March 15, 1922.

Very truly yours,

HUBERT WORK,
Secretary.

11. On January 8, 1927, the then Solicitor for the Department of the Interior rendered an opinion in the case of Jane B. Andrews, applicant for enrollment on said rolls, which opinion is attached hereto as Exhibit "B," and is made a part hereof. Following said opinion and on April 19, 1927, citation was issued upon Sarah Kadrie, next friend, mother, and natural guardian of relators, requiring her to show cause why the names of relators should not be stricken from said rolls. Thereafter and in due course, Sarah Kadrie, next friend, mother, and natural guardian of relators, made answer thereto, setting out their descent from an enrolled parent, their Indian blood, and previous enrollments, and alleging that as their rights had theretofore been put in issue upon the same basic facts upon which the citation issued and determined in the opinion of February 17, 1919, which opinion had long since become final, they could not further be inquired into by the Secretary. On October 1, 1927, the Secretary of the Interior rendered an opinion in words and figures as follows, to wit:

"The answer of Mrs. Sarah Kadrie to the citation to show cause why the names of her minor children should not be stricken from the tribal rolls of the Chippewa Indians of Minnesota, which

38 answer was submitted informally to the department and acknowledged by your office on August 29, 1927, has been given consideration in connection with the record in the case.

From a consideration of all the facts in this case, which are not being recited but are contained in the record, it is clear that these

children were never entitled to enrollment and should never have been enrolled with the Chippewa Indians of Minnesota following the rule laid down by the United States Circuit Court of Appeals in the case of Julia B. Oakes et al. *v.* United States (172 Fed. Rep. 305), and the practice of the department prior to the Mahaffie opinion of February 17, 1919. Therefore the names of Mary I., Evelina, Amit K., Bertha, Mailivan E., Marie, Dorothy, Elmer, and Omar Kadrie are hereby stricken from the rolls of the Chippewa Indians of Minnesota. You will make proper notation on the records of your office."

"12. On November 21, 1927, formal notice was given the Chippewa Indians of Minnesota by the Department of the Interior through its representative stationed in Minnesota, that all further distributive shares of the money payments to any person enrolled under the opinion of February 17, 1919, will be withheld and suspended, pending further departmental action.

"13. No payments from the principal of the trust fund or interest arising thereon have ever been made per stirpes but all payments have been made per capita to the persons whose names appear upon said rolls.

It is further stipulated that either of the parties may offer proof upon other and additional questions not covered in the above stipulation.

"14. It is further stipulated that any acts of Congress or other laws, or agreements, or official records of negotiations not cited herein, which are pertinent to the issue, may be cited by counsel and considered by the court as fully as if herein specifically referred to; that the excerpts herein, having been copied from original acts to shorten the record and for the convenience of the court, are not intended to prevent either party, or the court from citing or considering the said acts in full, or otherwise limiting an application to the issue of any act or law pertinent thereto."

In seasonable time and when paragraph 8 of said stipulation
39 was read counsel for plaintiffs objected to paragraph 8 of the stipulation on the ground that the act of June 7, 1897, under which the regulation and instructions were issued was a general act of Congress applicable to property of Indians maintaining tribal relations, whereas the property of the Chippewa Indians of Minnesota was governed and controlled exclusively by the provisions of the agreements approved March 4, 1890, and entered into under the authority contained in the act of January 14, 1889, and that said act and regulations and instructions issued thereunder had no application to the claimed rights of plaintiffs; and further that there was no evidence that the department for more than ten years after the issuance of said regulations and instructions ever attempted to make them applicable to the Chippewa Indians of Minnesota. The court overruled the objection, to which an exception was duly noted and allowed.

Thereupon counsel for plaintiffs offered in evidence the following affidavit of Simon Michelet, which it was agreed by counsel for

defendant should have the same evidentiary value as if Simon Michelet appeared in person and testified to the facts therein stated in open court, but to the admission of which in evidence, defendant's counsel objected for the reasons heretofore given. The objection was overruled, to which defendant excepted:

"Simon Michelet, being by me first duly sworn according to law deposed and said, that in the year 1901 affiant was nominated and confirmed as United States Indian agent at White Earth, Minnesota, and shortly thereafter entered upon the discharge of his duties as such agent and continued until, as affiant remembers, some time during the fall of 1905, when the office of Indian agent was merged into the office of superintendent of schools, at which time affiant was appointed superintendent of schools and continued in said office until about May 1, 1908; that during all of said period affiant had direct charge of the making of all annual annuity or other payments to all the Chippewa Indians in Minnesota enrolled on the census roll made by the commission appointed under the act of January 14, 1889, and under the jurisdiction of said agency; that in making said payments affiant at all times followed the practice of disbursing the annual interest payments per capita among the Chippewa Indians of Minnesota whose names appeared on said census rolls and *and* their children in being at the time when each annual payment was made; that as a basis for each annual payment the said census rolls were, before each payment was made, revised by affiant by striking therefrom the names of all persons appearing thereon who had died since the preceding annual payment was made, and adding thereto the names of all children born since the last annual payment was made to parents who were enrolled on said census rolls; that in adding the names of newborn children proof was required that the newborn was a child of an enrolled parent; that no inquiry was made as to the place of birth of the children of enrolled parents and that all children of enrolled parents were enrolled on said rolls irrespective of where born; that so far as affiant can recall there was never any instruction received by him from the department while he held said position directing any different procedure in the making of said rolls.

"Affiant further says that while he held said position he had no knowledge of any tribal organization or tribal government maintained by all the Chippewa Indians in Minnesota and no such organization was recognized by said agency or superintendent of schools, or by the department so far as affiant knows; that occasionally persons claiming that they were entitled to enrollment on one of the census rolls as a member of a particular band but had been omitted therefrom by the commission through mistake or for other causes, or claiming that they were the children of parents so entitled but who had not been enrolled, applied to the office or to the department for enrollment; that the members of the particular band with which the applicant claimed enrollment who were residing at White Earth

or in that vicinity were permitted to hold a meeting, called a council, for the purpose of considering the claim of the applicant or applicants and expressing their views with reference to the right of the applicant or applicants to such enrollment, and their views as so expressed were by affiant transmitted to the department as advisory only. Affiant further says that in no instance while affiant was in charge of said office was any meeting or council held with reference to the enrollment of a child of a parent whose name appeared on said census rolls."

41 Plaintiffs then offered in evidence the following depositions, to all of which defendant objected for the reasons heretofore noted. The court overruled the objections, to which defendant excepted. Counsel for plaintiff then read in evidence the deposition of William Dailey, who after being first duly sworn testified as follows:

Witness was originally enrolled by the Rice Commission appointed under the act of January 14, 1889. Since July, 1907, he has been an employee of the Indian Bureau stationed in Minnesota and in charge of the preparation of the annuity rolls. He has had charge of all enrollments. From 1907 to about 1916 the practice of enrolling children was to require proof that they were the child of an enrolled parent. That was the only proof required prior to 1916. In 1916 the department issued regulations requiring some proof of residence as a qualification for enrollment. Children born off a reservation were not to be enrolled. This was construed to mean that children born down in Minneapolis or St. Paul, away from the former reservations, were born "off a reservation" and could not be enrolled. If the child was born within an area embraced in any of the former reservations, it was considered as having been born on a reservation. For instance: If a child was born on the former ceded Fond du Lac Reservation, which was ceded under the agreements approved March 4, 1890, the child was considered as having been born on a reservation. That practice continued until the Mahaffie opinion of February 17, 1919, after which it was discontinued and no proof was required except that the child was a child of an enrolled parent, until the so-called Patterson decision was rendered January 8, 1927. Between 1916 and February 17, 1919, they enrolled Indian children who were not born on any of the former ceded reservations but who were born in communities in which many of the Indians lived, as, for instance, Tamrack and Grand Marais, Sandy Lake and East Lake. None of these places were within the boundaries of any reservation dealth with by the act of January 14, 1889. In making the enrollments during the restricted period from 1916 to

42 February 17, 1919, they considered the White Earth Reservation as a community. They did so because there were still a considerable number of Indians living there. The Red Lake Reservation is the only reservation existing in Minnesota. Witness has been in charge of enrollment work for more than twenty years, with

the exception of about eight or nine months, when he first became employed by the Indian Bureau.

Plaintiffs next offered the deposition of Edward L. Rogers, who after being duly sworn testified as follows:

In 1899 witness was a member of the Sandy Lake Band of Chippewa Indians; has been for twenty-three years a member of the bar of Minnesota, fourteen years county attorney of Cass County. Witness has at various times interested himself in the affairs of the beneficiaries the trust created by the act of January 14, 1889, has appeared before committees of Congress, prosecuted an appeal to the President of the United States from the decision of the commission created under the Minnesota National Forest act of May 23, 1908 (35 Stat. 268). Prior to March 4, 1890, when the President approved the agreements with the Chippewa Indians entered into under the authority contained in the act of January 14, 1889, the Sandy Lake Band of Chippewa Indians, of which witness was born a member, had a chief and was a recognized band of Indians. The chief and headmen conducted the affairs of the band. Since March 4, 1890, the band has had no chief, no headmen, and no tribal or band government. None of the other bands or tribes of Chippewa Indians that were merged under the agreements approved March 4, 1890, have since that date had any band or tribal governments, chiefs, or councils. Since March 4, 1890, the Chippewa Indians of Minnesota have had no chief, counsel, or other officers authorized to act for them as a body. Prior to March 4, 1890, the various bands or tribes of Chippewa Indians in Minnesota had well-defined reservations set apart for their use under treaties and executive orders. Since March 4, 1890, there has been no reservation in Minnesota except the Red Lake Reservation created under the act of February 20, 1904.

43 Witness was enrolled by the Rice Commission appointed under the act of January 14, 1889. He was married to a white woman. Their oldest child was born in 1906 at Detroit Lakes, a village incorporated under the laws of the State of Minnesota. Witness made application for the enrollment of his first child on the annuity rolls. No proof was required except that the child was his child. His next child was born in 1908 at the village of Walker, which was not within the limits of any reservation. Witness applied for the enrollment of his second child and no proof was required except that the child was his child. Subsequently, there were born to witness and his wife three other children, all born at the town of Walker, Minnesota. Applications were made for their enrollment on the annuity rolls following their birth and no proof was required except that they were the children of witness. All of witness' children were enrolled and have ever since remained on the rolls. In the cases of the first three, all witnesses did was to report their birth to the agent. In the cases of the last two, witness was required to fill out a legal form, but no proof was required that they were born on a reservation or had any tribal or band affiliation. With the exception of the ten months when witness resided at Mahnomen, he has

resided continuously at Walker for the past twenty-three years. Witness' wife is not a member of any band or tribe and is not of Indian blood.

Witness was a member of a General Council referred to in Acts of Congress. It was a voluntary organization composed of members of the former bands which formerly occupied the different reservations. It had no authority to represent the Chippewa Indians as a whole. It bore no similarity to the tribal governments that existed prior to March 4, 1890. Its principal purpose was to present matters at Washington for the best interests of the beneficiaries under the trust created by the Act of 1889. There was also other organizations calling themselves Geneeral Councils, one of which was incorporated under the laws of the State of Minnesota. They were all of a similar nature. None of them had any authority to speak or act for the Chippewa Indians as a whole.

44 Plaintiffs next offered the deposition of Frank D. Beaulieu, who, after being duly sworn, testified as follows:

Witness resides at White Earth, Becker County, which was once a part of the White Earth Reservation. It is witness' knowledge and information that substantially all of the land set aside for allotment purposes on the White Earth Reservation was allotted and that more than ninety-five per cent of the allotted lands have been sold by the original allottees. Substantially all of the allotted portion of the former White Earth Reservation is now owned by whites. It lies within the counties of Becker, Clearwater and Mahnomen. With the exception of the Red Lake Reservation created under the Act of 1904 witness has no knowledge of any other reservation in Minnesota. Witness was enrolled by the Rice Commission as a member of the Mississippi Band. Witness is a member of the bar, practicing at White Earth, Minnesota. Witness has lived substantially all his life within the territory formerly embraced in the White Earth Reservation. Prior to March 4, 1890, the different bands or tribes of Chippewa Indians in Minnesota had chiefs and headmen who were authorized to represent their bands. Since March 4, 1890, there has been no chiefs, headmen, or tribal governments. The former chiefs have not purported to exercise any authority over any Indian property. They are looked upon as any other individual. Witness has had some experience in enrollment work. The question of residence has not been inquired into. The fact the parents were enrolled seemed to be the controlling factor in securing enrollments of new born children. Witness as attorney had secured the enrollment of children born in Minneapolis and St. Paul. The fact that the parents had left the Indian country made no difference. In the cases in which witness had appeared as attorney the only proof required was that the child was the child of an enrolled parent. Witness was familiar with the organization

known as the General Council. The organization was a voluntary association and was political in its nature. There has been no tribal organization or government representing all the Chippewa
45 Indians of Minnesota since 1889. The General Council of which Mr. Rogers was President was wholly dissimilar to the band and tribal organizations existing prior to 1889. There have been at various times since 1889 various general councils, all of a social or political nature, none of which had any power to represent the Indians generally. None of these councils attempted to assume any governmental authority or to regulate internal social affairs of the Indians. Since 1889 the Chippewa Indians of Minnesota have had no chiefs, no councils, or other attributes of tribal government. Since 1899 all of the affairs of the Indians have at all times been regulated and controlled by the State laws to the same extent as though they were white citizens.

Thereupon plaintiffs rested. Defendant demurred to all the evidence and moved the court to strike it out *in toto*, for the reasons stated in the beginning, and to render judgment in his favor and against plaintiffs. Motion overruled; defendant notes an exception. Thereupon defendant declined to offer evidence and rested.

Counsel for plaintiffs separately objected to the inclusion in the Bill of Exceptions of each of the objections and exceptions taken by counsel for defendant to the ruling of the Court, which objections were separately overruled and exceptions taken and allowed.

Thereafter objections and exceptions were duly made, taken, and allowed to the opinion of the Court and the judgment entered.

Order settling bill of exceptions

Be it further remembered that the foregoing comprises the substance of all evidence offered in the case, and that each and all of the exceptions stated were duly noted and allowed by the Court, and that the plaintiffs then and there prayed the Court to sign this statement of the evidence and the same is accordingly done and made a part of the record in this cause, now for then, this 25th day of April, 1928, the plaintiffs and defendant being in Court by counsel.

JENNINGS P. BAILEY,
Justice.

The foregoing Bill of Exceptions is satisfactory.
O. H. GRAVES,
Attorney for Defendant.

46 Exhibit "A"

Official

Department of the Interior, Office of the Solicitor, Washington

Charles D. Mahaffie, Solicitor

D. 43048.

FEB. 17, 1919.

DEAR MR. SECRETARY:

Questions having arisen as to the rights of certain children born to persons whose names appeal on the tribal rolls of the Chippewa Indians of Minnesota to share in the interest accruing upon the fund arising under the act of January 14, 1889 (25 Stat., 642), the matter has been referred to me "for an opinion on the legal points involved."

Said act must be construed on the same principle as a deed of trust, which in legal effect it is, so far as concerns the questions herein discussed. The Chippewa Indians of Minnesota, as a tribe or aggregation of tribes, are the "settlors" of the trust. The acceptance by those Indians of the provisions of the statute is shown by the report of the negotiators (H. R. Ex. Doc. 247 51st Cong. 1st Ses.). By their acceptance of the statutory provisions the tribe, *as a tribe*, became the settlors of the trust; and the trustee is the United States, to which the settlors transferred the legal title to their lands, charged with the trusts specified. (The trust for allotments is distinct from that touching the funds, proceeds of the unallotted and unreserved lands thrown open to sale.) The trust touching the funds has as its beneficiaries, not the Indians *as a tribe* (the settlors), but the *Indians as individuals*. In construing the act hitherto, it may have been too hastily assumed that the beneficiaries of the trusts were identical with the settlors thereof. Such an identity is found only in the case of trusts created by a settlor for his own benefit, a class by no means embracive of all trusts.

The Indians, considered as old reservation units, and the tribe as a whole, considered with reference to the Red Lake
47 Reservation, surrendered their lands, the consent of individual Indians already holding allotments also being required to the surrender of those previous allotments. The surrendered lands were to be sold as part of the public domain, and the proceeds of such sales were constituted a trusts fund, one-half the interest accruing from which was to be paid as annuities "in equal shares to the heads of families and guardians of orphan minors for their use," and one-fourth of which interest was to be paid "in equal shares per capita to all other classes of said Indians"—the remaining one-fourth being devoted to Indian education; and the whole principal

of said fund was to be distributed at the expiration of fifty years "to all said Chippewa Indians and their issue then living, in cash, in equal shares." Congress might divert not more than five per cent of the principal fund to other Indian uses during the fifty years.

Thus it appears that Indian blood—membership among the individual Indians originally enrolled as together constituting the tribe that created the trust and conveyed the surplus lands giving rise to the trust fund, or descent from those Indians—is made the essential and sole basis of the right to participate in the current interest accruing from the fund and in its final distribution. Participation in the current interest (the "annuities") and in the principal differ somewhat from one another—the one being (as to one-half of the interest) by heads of families and by guardians of orphan minors for their use, and (as to one-fourth of the interest) by "all other classes of said Indians,"—adults not heads of families, and minors not members of families or orphans under guardianship—and the other being by "all said Chippewa Indians and their issue then living, in cash, in equal shares." But so the trust is settled. And nowhere in its terms of settlement is either residence with or continued or "recognized" membership of the tribe, or birth on the reservation, or United States citizenship, or any other qualification mentioned, save only being "a Chippewa Indian," i. e., possession, in whole or in part, of the blood of one of the originally enrolled members of that tribe.

In the direction for final distribution to "all the said Chippewa Indians and their issue then living," the word "issue" is used in its enlarged, not its restricted sense. That is, it includes all the
48 ancestors lineal descendants in the second and subsequent generations as well as in the first generation. See Wistar v. Scott, 105 Pa. St., 200, 51 Am. Rep., 197; Pearce v. Rickard, 19 L. R. A., 472; Bouvier's Law Dict., tit. "Issue"; Price v. Sisson, 13 N. J. Eq., 168, 176; Jarman on Wills, vol. 2, p. 33.

The issued then includes all the lineal descendants of the ancestor. But the ancestor must be found to have been of the tribal membership at the time of the creation of the trust. His "recognition" by the tribe as such is merely evidentiary of such membership, and is not the sole evidence competent to establish the fact. His descendants (whether children or grandchildren) take an interest, not as tribal members, but as of the ancestor's blood; his blood entitling him and them alike, because it was tribal blood.

This construction of the trust is in line with that given by the United States Supreme Court, in Cherokee Nation v. Journeycake (155 U. S., 196, 205), to the agreement of April 8, 1867, between the Cherokee Nation and the Delaware tribe; holding that the agreement, although made with the Delaware tribe, was for the benefit of the individual members of that tribe, vesting them, as individuals with specific allotments, and, at the same time, incorporating them, as

individuals, into the membership of the Cherokee Nation, with consequent proportional rights, per capita, in all its lands as well as funds.

The construction is also in accord with the general policy of the United States in dealing with its Indian wards. That policy has been directed chiefly toward the objects of preparing them for the duties and advantages of citizenship, and of effecting their amalgamation in the general mass of citizenship.

To this end they have been encouraged to acquire the customs and habits of civilized life as rapidly as practicable. This necessarily involved abandonment of their tribal organization and associations. It was obviously in contemplation of such abandonment that the statute here under discussion was framed.

This policy is exhibited both in the sundry cession and reservation treaties and preliminary or confirmatory statutes, and in in the provision for allotments, including the general allotment act of February 8, 1887 (24 Stat., 388), and also in the statutes providing for Indians' acquisition of
49 citizenship without impairment of their Indian property rights. See section 6, act of 1887, supra, conferring citizenship on allotted Indians and those who have severed tribal relations, without loss of their rights in tribal property; section 2, act of August 9, 1888 (25 Stat., 392), conferring citizenship on Indian women contracting marriage with white citizens, without loss of their rights in tribal property; section 1 (at p. 90), act of June 7, 1897 (30 Stat., 62), securing to the issue of an Indian woman by blood then or at the time of her previous death recognized by her tribe, and her white husband, the same rights and privileges as other tribal members; the provisions of the act of June 21, 1906 (34 Stat., 325), removing restrictions on alienation of White Earth reservation allotments to mixed blood Indians and such full bloods as the Secretary of the Interior shall find competent; and section 1, act of March 2, 1907 (34 Stat., 1221), providing for apportionment and payment of their pro rata shares of any tribal trust funds to individual Indians found capable of managing their own affairs.

The decision of the Circuit Court of Appeals in Oakes v. United States (172 Fed. 305, 309) involved only the trust created under the act of 1889 as to reservation lands and their allotment, and was not concerned with the trust as to distribution of tribal funds and their current interest yield. The enjoyment of an allotment right places the allottee in immediate contact with others of the tribe, so that there was more reason for holding it intended that none should enjoy that right except those having not merely a share in the tribal blood but recognized tribal membership. The Oakes case, while embracing statements arguendo adverse to the construction here given the statute, is not, in its conclusion upon the precise subject involved, opposed to the views herein expressed touching the proper scope of distribution of the trust fund and its interest yield.

Underlying the Oakes case and cited therein to sustain its conclusion, are two decisions of this Department—William Banks (25 L. D., 71), an opinion by former Assistant Attorney-General Van Devanter, who afterwards, as judge, rendered the decision in
50 the Oakes Case, resting in part on his own earlier opinion; and Minnie H. Sparks (36 L. D., 234).

In William Banks, supra, the Secretary of the Interior was advised that a member of the Sac and Fox tribe of Missouri Indians who had severed his tribal relations and resided at a distance from the tribe, but whose tribal rights came within the protection of the act of June 7, 1897, supra, was still entitled to an allotment as if his name were still on the original tribal roll, but that his children were not so entitled.

In Minnie H. Sparks, supra, it was held that while residence upon the White Earth reservation was a condition precedent, under the acts of January 14, 1889, supra, and April 28, 1904 (33 Stat., 559), to the right to an allotment thereon, it was not a condition of the right to share in the tribal annuities. This decision rests, arguendo, upon the governmental policy of encouraging the Indians to abandon tribal relations and adopt the habits of civilized life. It would not be in furtherance of that policy to subject Indians so doing to forfeiture of annuities for their children afterwards born apart from the reservation, while preserving their own annuities.

In the paticular case giving rise to a call for this opinion, Sarah Kadrie, nee Cogger, was a fullblood Chippewa Indian woman born on the reservation in the year 1892—subsequent to the cession and the original enrollment. She was an only child of her mother, a member of the original enrollment. As such, she is entitled to participate for herself in the annuities; and that right is accorded to her. She married, in 1909, Mall Kadrie, a native of Syria, and since then has resided with him mainly in Canada, but for a short time in Syria—and at no time on the reservation, although occasionally visiting it. There have been born of said marriage four children, the oldest now about nine years of age. Her three oldest children were for some years enrolled among the Chippewa Indians, and she was paid annuities for them, until the year 1917, when, by direction of the Indian Bureau, their names were stricken from the roll and their annuities withheld. At the same time, the enrollment of the youngest child was refused.

In my opinion, this action was erroneous, and should be cor-
51 rected. Sarah Kadrie and her children are "issue" of her mother, a full-blood Chippewa Indian duly enrolled, and as such they will be entitled, at the expiration of the trust period, to share in the distribution of the trust fund; and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited either by acquiring foreign citizenship or by abandoning, or failing to acquire, residence on the Indian reservation or with the tribe.

Whether the current annuity payments or the final distribution of the principal should properly be made per capita or per stirpes is not here considered, and until the question is directly presented the distribution may well follow, in that respect, the usage of the Indian Bureau hitherto. But the basis of distribution should at all events be solely the possession of blood of tribal members at date of creation of the trust, irrespective of residence or citizenship.

Cordially yours,

CHARLES D. MAHAFFIE,
Solicitor.

The honorable the SECRETARY OF THE INTERIOR.

Exhibit "B"

13600

United States Department of the Interior, Office of the Solicitor, Washington

M-15954.

JANUARY 8, 1927.

The honorable the SECRETARY OF THE INTERIOR.

DEAR MR. SECRETARY:

My opinion is requested on the question of the rights of certain persons to share in the distribution of the interest accruing upon and of the principal of the funds arising under the act of January 14, 1889 (25 Stat. 642), entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota."

The question arises in connection with an application filed
52 by Mrs. Jane B. Andrews under the act of April 14, 1924 (43 Stat. 95), entitled "An act to provide for the payment of claims of Chippewa Indians of Minnesota for back annuities."

The family history of Mrs. Andrews is set out in the case of Oakes v. United States (172 Fed. 305), decision in which was rendered in 1909, construing the provisions of the act of January 14, 1889 (25 Stat. 642). She is a descendant of Margaret Beaulieu, a full-blood Minnesota Chippewa, who was enrolled and recognized as a member of that tribe and was living upon the tribal reservation at White Earth at the time of her death. The grandmother of Mrs. Andrews was Julia B. Beaulieu, the daughter of Margaret Beaulieu who was born a member of the same tribe and was enrolled and recognized as such until 1849. In 1829, Julia B. Beaulieu married a white man by the name of Oakes and they lived in the Chippewa country until 1849. In that year they moved to Ft. Ripley on the Mississippi, and the next year to St. Paul, where the husband, Mr. Oakes was engaged in the banking business until the time of his death in 1879. The mother of Mrs. Andrews was Jane B. Jones, a daughter of Mrs. Oakes, who was born in the Chippewa country and was enrolled and recognized as a member of the tribe until 1849, when her parents

took her to Ft. Ripley and then to St. Paul. Mrs. Jones was married twice, each time to a white man. Mrs. Andrews is a daughter of Mrs. Jones by her first husband whose name was Van Etten and was born and reared in St. Paul. She was never enrolled or recognized as a member of the tribe, and was also married to a white man. Ast stated by the court in the Oakes case: "After the Oakes family moved to St. Paul, Mrs. Oakes and Mrs. Jones, abandoned their former tribal relation, adopted the customs, habits and manners of civilized life and ceased to be recognized as members of the tribe."

The members of the above family, with the exception of the great-grandmother, Margaret Beaulieu, were all residents of St. Paul, when the act of January 14, 1889, was passed. Margaret Beaulieu, the mother of Mrs. Oakes, died in 1877, which was long prior to the passage of said act of 1889. The names of Mrs. Oakes and Mrs. Jones were placed upon a supplemental roll in 1894, but were dropped therefrom the next year. In 1905, they applied for allotments of
52 specific lands, but their applications were denied. Thereupon, they commenced suit in the Circuit Court of the United States, District of Minnesota, asserting that they were entitled to have allotted to them certain lands on the White Earth Reservation, but that their applications have been unlawfully denied. The court found that none of the applicants came within the terms of the act of 1889. They then appealed to the Circuit Court of Appeals, Eighth Circuit (Oakes v. United States, 172 Fed. 305). Before applying for allotments Mrs. Oakes and Mrs. Jones took up their residence on the White Earth Reservation. In the Oakes case the court said: "Whether or not Mrs. Andrews and Mrs. Bent also a daughter of Mrs. Jones did likewise may be left undetermined because if they did, it would not help them as will be seen presently."

Broadly speaking, the act of 1889, known as the Nelson Act, provided for the cession by "all the different bands or tribes of Chippewa Indians in the State of Minnesota" of all their title and interest in and to their reservations in said State not needed for allotments; for allotments of land in severalty in conformity with the act of February 8, 1887 (24 Stat. 388), and for the sale of the remaining lands. The money thus accruing after deducting expenses was to be placed in the Treasury of the United States to the credit of "all the Chippewa Indians in the State of Minnesota" as a permanent fund to draw interest at the rate of 5 per centum per annum for fifty years, such interest and permanent fund to be expended as follows:

One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the

Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and
54 paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares.

The act of April 28, 1904 (33 Stat. 539), known as the Steenerson Act, providing for allotments to Indians on the White Earth Reservation in Minnesota, authorized allotment "to each Chippewa Indian now legally residing upon" that reservation under treaty or laws of the United States in accordance with the express promise made by the Commissioners appointed under the act of January 14, 1889.

By a provision in the act of May 18, 1916 (39 Stat. 123, 137), the Secretary of the Interior was authorized "to advance to any individual Chippewa Indian in the State of Minnesota, entitled to participate in the permanent fund of the Chippewa Indians of Minnesota, one-fourth of the amount which would now be coming to said Indian under a pro rata distribution of said permanent fund."

In the Oakes case after referring to various provisions of the act of 1889 in the following language: "that the cession and relinquishment shall be deemed sufficient as to each reservation, other than the Red Lake Reservation if made and assented to in writing by a designated portion of the 'band or tribe of Indians occupying and belonging to' such reservation * * *"; "that for the purpose of determining whether the requisite number of Indians participate in the cession and relinquishment and of making the allotments and payments mentioned in the act, an accurate census of 'each tribe or band' shall be made"; "so as soon as the census shall be taken * * * allotments in severalty shall be made * * * from the unceded part of the White Earth Reservation, such allotments to be made 'in conformity with' the general allotment act of February 8, 1887 (24 Stat. 388, c. 119)"; "that any of said Indians 'residing on' any of said ceded reservations may, in his discretion, take his allotment on such reservation"; "and that all money accruing from the disposal of the ceded lands, after deducting expenses, shall be placed in the Treasury of the United States to the credit of 'all the Chippewa Indians of Minnesota' and be used for their benefit or paid out to them in the manner and at the times stated in the act"—the court held:

Originally, the test of the right of individual Indians to
55 share in tribal lands, like the Chippewa reservations in Minnesota, was existing membership in the tribe, and this was true of all tribal property. The question therefore arises: Is there any provision of law which broadens this original rule in a manner which is helpful to the appellants or any of them? If not, their effort to obtain allotments from tribal lands must fail, because it is a necessary conclusion from the facts before recited that Mrs. Oakes and Mrs. Jones, although once members of the Mississippi Chippewa tribe, long since ceased to be such, and that Mrs. Andrews

and Mrs. Bent, although possessing some Mississippi Chippewa blood, never were members of the tribe; and, if there be such a provision of law, it must be found elsewhere than in the act of 1889, for that act does not in itself alter the original rule in a manner which is helpful to any of the appellants, but contains provisions which, in the absence of some provision of law to the contrary, probably would require that the allotments mentioned therein be confined to tribal Indians.

The court then referred to the act of March 3, 1865 (13 Stat. 562), "which gave to certain chiefs, warriors, and heads of families of the Stock Bridge Munsee tribe, the right to 'become citizens of the United States,' upon their dissolving all tribal relations, adopting the habits of civilized life, become self-supporting and learning to read and speak the English language, and then declaring that they should not be deprived thereby of the annuities to which they were or might be entitled"; to the act of March 3, 1875 (18 Stat. 420), which extended the benefits of the homestead law to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of 21 years and who has abandoned or who may hereafter abandon his tribal relations," and it then declared: "any such Indian shall be entitled to his distributable share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relation"; to the act of February 8, 1887, which in section 6 provides:

* * * And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

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and to the act of August 9, 1888 (25 Stat. 399), which declares that a tribal Indian woman thereafter marrying a citizen of the United States shall become thereby a citizen of the United States without impairing or in any way affecting her right to any tribal property or any interest therein.

Following the above reference, the court in the Oakes case held:

These acts disclose a settled and persistent purpose on the part of Congress so to broaden the original rule respecting the right to share in tribal property as to place individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing, in that regard, as though they had maintained their tribal relations. Not

only this, but these acts, omitting that of 1865, are general and continuing in their nature, and therefore are as applicable to the Chippewas in Minnesota as to other Indians, unless the act of 1889 discloses, either expressly or by necessary implication, that Congress intended otherwise. In Our opinion that act does not thus disclose such an intention.

* * * * * * *

We conclude that Mrs. Oakes and Mrs. Jones, who formerly were members of the tribe, are within the saving provisions of the acts of March 3, 1875, and February 8, 1887, and so are entitled to share in the allotment and distribution of the tribal property, the same as though they had maintained their tribal relations, but that Mrs.
57 Andrews and Mrs. Bent, who never were members of the tribe, can not derive any benefit from any of the acts mentioned; and we reach this conclusion with greater satisfaction, because it is in accord with rulings of the Secretary of the Interior in cases which are not distinguishable from this. William Banks, 26 Land Dec. Dep. Int. 71; Minnie H. Sparks, 36 Land Dec. Dept. Int. 234.

Reference was also made in the Oakes case to the act of June 7, 1897 (30 Stat. 90), which provides:

That all children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized bythe tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right.

The court held that this provision does not embrace the children (Mrs. Andrews and Mrs. Bent), of a mother such as Mrs. Jones, who was living at the time of its passage and was not then recognized by the tribe as one of its members.

In 1919 following and pursuant to an opinion rendered by the Solicitor of this Department on February 17, 1919, is what is known as the Kadrie case, Mrs. Andrews applied for tribal annuity payments under section 7 of the act of January 14, 1889, supra. Her application was denied by your office on the ground that in view of the decision in the Oakes case she did not come within the saving provisions of the acts of 1875 and 1887, never having been a member of the tribe and therefore was not entitled to the rights claimed by her under the Solicitor's opinion of 1919.

The act under which Mrs. Andrews is now applying for back annuity payments, that of April 14, 1924 (43 Stat. 95), reads as follows:

That the Secretary of the Interior be, and he is hereby, authorized to pay, out of any moneys belonging to the Chippewa Indians
58 of Minnesota, such amounts as he may find due any persons of Chippewa blood whose names may have been erroneously omit-

ted or stricken from the Chippewa annuity rolls, or who have been or may hereafter be found entitled to enrollment for annuity payments authorized by section 7 of the Act of Congress approved January 14, 1889 (Twenty-fifth Statutes at Large, page 642).

It is clear that this act does not confer any new or additional rights upon the persons contemplated therein. Hence the application of Mrs. Andrews is in effect one for reopening and rehearing a case in which the rights sought by her have repeatedly been denied as by the terms of said act the qualifications to entitle claimants to enrollment and payment of back annuities are still to be determined under the provisions of the act of January 14, 1889. The Department has already held that the act was evidently not intended to disturb existing laws or the rules for determining rights to enrollment for annuity payments under the act of 1889; and consequently that consideration must be given to precedents and the construction theretofore placed upon said act of 1889. The report on the bill which subsequently became the act of April 14, 1924, shows that the primary purpose of its enactment was to remove any doubt as to authority under existing law to pay claims for back annuities from the permanent Chippewa trust fund created by the act of 1889, there being no other available funds belonging to the Indians from which such claims could be paid.

t It is true the Oakes case was primarily concerned with allotments of tribal lands. But after all an allotment is only a share in the tribal property. The acts of 1875 and 1887 make no distinction between real and personal property. There is no question that membership in the tribe is necessary to sustain a claim to share in Indian tribal property, was formerly the general rule and obtained in respect of Chippewa lands and money. Tribal membership is equally necessary to entitle an Indian to share in the funds derived from the sale of the tribal lands. This general rule has been modified by statute as pointed out in the Oakes case so as to include those former members who have abandoned tribal relations once existing, but whose rights to share in tribal property are protected by the
59 acts mentioned. No inference, however, can be drawn from wording of the act of January 14, 1889, that any of the funds arising thereunder were to be given to any person who was never a member of any band or tribe of Chippewa Indians in Minnesota. The act of 1889 provides that allotments thereunder shall be made in conformity with the general allotment act of 1887, which expressly recognizes the right to individual Indians who have abandoned thier tribal relations to share in "tribal or other property." Reference is made in the Oakes case to both the acts of 1875 and 1887. The former act declared as hereinbefore stated, that an Indian who has abandoned his tribal relations shall be entitled to his distributive share of "all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations," and the latter, that an Indian by taking up his residence separate and apart from his tribe and adopting the habits of civilized life does not thereby im-

pair his right to "tribal or other property." These acts contemplate an Indian who is a member of the tribe and therefore has something, some status, to abandon. No legislation has been passed since the act of 1889, to change the above situation. The acts of 1904, 1916, and 1924, merely pertain to the manner in which allotments are to be made and the funds of the tribe paid to the person's fund entitled thereto. So that, as stated, in determining rights to tribal property recourse necessarily must be had to the act of 1889.

In the Oakes case the court referred with approval to the case of Minnie H. Sparks (36 L. D. 234). She was originally a duly enrolled and recognized member of the Chippewa tribe, but her name was dropped from the rolls for nonresidence. The department after referring to the act of April 28, 1904, supra, held that while residence upon the White Earth Reservations is a condition precedent to the right to an allotment of land on that reservation, an Indian does not forfeit his right to annuity payments under section 7 of that act by removing from the reservation and adopting the habits of civilized life. The fact is that Mrs. Sparks lived on the reservation until the death of her mother. Her name was restored to the rolls for annuity payments, on the ground that she had at one time lived on the reservation and was a recognized member of the tribe.

The position was taken in the Oakes case that the act of
60 1889 did not expressly nor by necessary implication displace the saving provisions of the act of 1887, nor render those provisions less applicable to the Chippewas in Minnesota than to other Indians.

While as hereinbefore stated, the Oakes case was primarily concerned with allotment rights, yet in its discussion the court made no distinction between allotments of land and money payments. The court did refer to acts providing for the distribution of "annuities," "tribal funds," "tribal or other property," and employed such terms as "deprived thereby of annuities," "right to share in tribal property," "making the allotments and payments mentioned in the act," "share in the allotment and distribution of the tribal property, the same as though they had maintained their tribal relations"—all strongly indicating that the court did not regard any distinction existed between tribal, real and personal property, the right to each being dependent upon tribal membership.

It may be repeated here that the great-grandmother of Mrs. Andrews, Margaret Beaulieu, died in 1877, and that neither Mrs. Oakes nor Mrs. Jones, her grandmother and mother, respectively, were recognized members of the Chippewa Tribe of Indians in Minnesota at the date of the passage of the act of January 14, 1889, having long prior thereto abandoned their tribal relations; that Mrs. Andrews was never a member of the tribe; that the effect of general legislation (acts of March 3, 1875, and February 8, 1887), is that where an Indian abandons tribal relations to adopt the habits of civilized life, he does not forfeit his share in tribal property,

which terms include lands and personal property; that the act of June 7, 1897, confers property rights on the children of an Indian woman who marries a white man and abandons her tribe; that such a woman would have rights under the acts of 1875 and 1887, but said acts do not extend rights to the children; that under the act of 1897, the children get the same rights a mother would have under the acts of 1875 and 1887, provided the mother was recognized by the tribe either at the time the act was passed or at the time of her death; and that as the mother of Mrs. Andrews, Mrs. Jones, was living at the time of the passage of the act of 1897 and was
61 not then recognized by the tribe as a member, Mrs. Andrews took nothing under that act.

The foregoing was the situation in respect to rights under the provisions of the act of January 14, 1889, at the time the solicitor's opinion of February 17, 1919, in the Kadrie case was rendered. Up to that time the well-established rules, principles, and decisions above set forth uniformly governed in determining the qualifications essential to entitle Minnesota Chippewas to share in tribal property. At that time the act of April 14, 1924, had not been passed. There was no attempt in said opinion of 1919 expressly to overrule the existing practice in administering the act of 1889, but it did in effect accomplish that purpose in respect to annuity payments under section 7 of that act. There was an attempt to distinguish that case as follows: "The Oakes case, while embracing statements arguendo adverse to the construction here given the statute, is not, in its conclusion upon the precise subject involved opposed to the view herein expressed touching the scope of distribution of the trust fund and its interest yield." In view of the similarity of facts in the two cases and the conclusions actually reached by the court in the Oakes case, direct issue may very properly be taken as to the correctness of the above statement. The fact is that the names of children having a similar status to those denied by the Oakes decision were stricken from the tribal rolls, because of that decision, and their names were restored only because of the opinion in the Kadrie case.

The precise question submitted in the Kadrie case "for an opinion on the legal points involved" was "as to the rights of certain children born to persons whose names appear on the tribal rolls of the Chippewa Indians of Minnesota to share in the interests accruing upon the fund arising under the act of January 14, 1889 (25 Stat. 642)."

The facts in the Kadrie case are as follows: Sarah Kadrie, formerly Cogger, was born on the White Earth Reservation in 1892 and was recognized as a Chippewa by blood, the degree being stated in some papers as three-eighths and in other as one-eighth. She is referred to in the solicitors' opinion of February 17, 1919, as being a full-blood Chippewa Indian. She was enrolled at the

White Earth Agency, was married to Mall Kadrie who had
62 no Chippewa or other Indian blood, and to this union four children were born, all in Canada. The father of these children was born in Syria, and there is nothing to show that he ever acquired citizenship in the United States. The superintendent at White Earth Agency reported that this family had resided in Canada, except for a period in 1914 and 1915, when it was in Turkey. It appears that three of the children were at one time on the rolls at White Earth Agency and some interest payments were made to the mother in their behalf, but in 1917 their names were stricken from the rolls by direction of your office, reference being made to and following the decision in the Oakes case. It may be said here that as Mrs. Kadrie was married after the act of June 7, 1897, supra, that act did not affect her children as they were not born of a marriage solemnized before its enactment, although said act is referred to in the solicitor's opinion of February 17, 1919, as though it had some controlling application in the Kadrie case.

It was contended in behalf of the claimants in the Kadrie case that a specific trust was created by the act of January 14, 1889, and that all children born within the 50-year trust period to persons enrolled and allotted under said act are beneficiaries under the trust, the case of Minnesota v. Hitchcock (185 U. S. 373), being cited in support of the contention. It was said in the solicitor's opinion of February 17, 1919, that "the trust touching the funds has as its beneficiaries, not the Indians as a tribe, (the settlers) but the Indians as individuals." The scope of that opinion with reference to the trust fund in question is shown by the following statements in that opinion, all of which statements it will be observed are not entirely consistent with each other:

"Thus it appears that Indian blood—membership among the individual Indians originally enrolled as together constituting the tribe that created the trust and conveyed the surplus lands giving rise to the trust fund, or descent from those Indians—is made the essential and sole basis of the right to participate in the current interest accruing from the fund and its final distribution. * * * But so the trust is settled and nowhere in its terms of settlement is either residence with or continued or 'recognized' membership of the tribe, or birth on the reservation, or United States
63 citizenship, or any other qualification mentioned, save only being 'a Chippewa Indian,' i. e., possession, in whole or in part, of the blood of one of the originally enrolled members of that tribe.

In the direction for final distribution, to 'all the said Chippewa Indians and their issue then living' the word 'issue' is used in its enlarged, not its restricted sense. That is, it includes all ancestors, lineal descendants in the second and subsequent generations as well

as in the first generation. * * * The issue then, includes all the lineal descendants of the ancestor. But the ancestor must be found to have been of the tribal membership at the time of the creation of the trust. 'His recognition' by the tribe as such is merely evidentiary of such membership, and is not the sole evidence competent to establish the fact. His descendants (whether children or grandchildren) take an interest not as tribal members but as the ancestor's blood; his blood entitling him and them alike, because it was tribal blood.

* * * But the basis of distribution should at all events be solely the possession of blood of tribal members at date of the creation of the trust irrespective of residence or citizenship."

The above opinion in so far as it holds that blood alone is the sole test is so at variance with the well-established practice and principles in decisions theretofore governing the determination of rights to share in Indian tribal property, as to create grave doubt of its correctness. Under such holding no showing of affiliation with or recognized membership in the tribe is required of a claimant in order to participate in the interest on and final distribution of the funds created by the act of 1889, the only requirement being possession of the blood in whole or in part of an originally enrolled member of the Chippewa Tribe of Indians in Minnesota. The views expressed in said opinion are sustainable only on the theory that the fund is individual and not tribal property. Apparently this was the contention at the time of the opinion was tendered. In the prior administration of the act of 1889, the department treated the fund as tribal property. Section 7 of the act itself under which the fund was to be created, contains a proviso showing the same to be tribal and not individual in character, as follows: "That Congress may, in its dis-
64 cretion, from time to time, during the said period of 50 years, appropriate, for the purpose of promoting civilization and self-support among said Indians, a portion of said principal sum not exceeding five per centum thereof." The courts have virtually decided that the fund is tribal and not individual property. In the case of Morrison v. Work (266 U. S. 481, 485), the Supreme Court said:

It is admitted that, as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare. The United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession. Morrison's contention is that, by virtue of the act of 1889 and the agreements made thereunder, the ceded lands ceased to be tribal property and the rights of the Indians in the lands and in the fund to be formed became fixed as individual property. The Court of Appeals held this contention to be unfounded. We have no occasion to determine whether it erred in so ruling. The claim of the United States is, at least, a substantial one.

The court in the case of Minnesota v. Hitchcock, supra, speaking of the act of 1889, said that the cession thereunder was not to the United States absolutely but in trust and described such trust as follows: "The trust was to be executed by the sale of the ceded lands and a deposit of the proceeds in the Treasury of the United States to the credit of the Indians, such sum to draw interest at five per cent, and one-fourth of the interest to be devoted exclusively to the maintenance of free schools among the Indians and for their benefit."

The court did not define the beneficiaries further than as "the Indians." This was evidently intended to describe those who ceded the lands from the sale of which the trust funds were to be derived. The commission appointed under the act of 1889 was to negotiate "with all the different bands or tribes of Chippewa Indians in the State of Minnesota," for the cession of their title and interest in and to all the reservations of "said Indians" in the State of Minnesota, except the White Earth and Red Lake reserva-
65 tions, such cession to be deemed sufficient as to each of said reservations except Red Lake, if assented to in writing by two-thirds of the male adults of "the band or tribe of Indians occupying and belonging to such reservations," and as to Red Lake if made by two-thirds of the male adults of all the Chippewa Indians in Minnesota. To ascertain whether a proper number of Indians gave their assent, the commission was to make an accurate census of "each tribe or band." In all this the band or tribe was the central idea. The individual to be entitled to join must have been a member of the tribe or band of Chippewa Indians in Minnesota.

At the time the opinion in the Kadrie case was rendered it was asserted on behalf of the claimants that the Indians understood when they agreed to the act of 1889 that all children born thereafter were to share in the interest payments and that "the principal when divided was to be divided among the living original enrolled and allotted Indians under said act and 'their issue' then living irrespective of where born." However, nothing was submitted to support the assertion as to the understanding of the Indians, and it is not sustained by the wording of the act. The report of the negotiations (H. R. Ex. Doc. 247, 51st Cong. 1st sess.), which resulted in the acceptance by the Indians of the act of January 14, 1889, affords no support to the assertion. Even if the Indians did so understand the act, it does not necessarily and absolutely follow that their understanding must control, if contrary to the wording and intendment of the act. The rule to govern in matters of this kind is familiar and has often been stated by the courts. In Minnesota v. Hitchcock, supra, speaking of the cession made under the act of 1889, it was said:

Can it be said that the Indians, making the cession, for a moment supposed that the lands ceded were not to be used for the purposes named, and if the language carries upon its face one obvious meaning, and would naturally be so understood by the Indians, that con-

struction within all the rules respecting. Indian treaties must be enforced.

In United States v. Mille Lac Chippewas (229 U. S. 498, 66 508), involving the construction of this act of 1189, it was contended that the Indians did not understand that certain homestead and preemption entries were to be carried to completion. The court upon this point said that the language of the provision involved is plain and unambiguous, and "the Indians, no less than the United States, are bound by the plain import of the language of the act and the agreement."

In La Roque v. United States (239 U. S. 62), the court refused to accept the contention that the Indians understood under this act of 1889 the right to select and receive allotments would not be terminated by death but would pass to the heirs. The understanding of the Indians if established would control, if the language used carried upon its face that obvious meaning, or if in accord with the sense which the words used would naturally be understood by the Indians as opposed to the technical meaning thereof. No inference can be drawn from the wording of the act of January 14, 1889, that any of the funds arising thereunder were to be given to any person who was never a member of any band or tribe of Chippewa Indians in Minnesota.

In the decision of a case dated March 29, 1918, typical of the position taken by the department prior to the solicitor's opinion of February 17, 1919, in the Kadrie case, it was held:

The act, when read as an entirety, relates clearly to Indians of the several Chippewa reservations who are properly enrolled members of the various tribes and bands and entitled to receive benefits therewith: and the provision for a division of the permanent fund therein provided that its payment 'to all of said Chippewa Indians and their issue then living' at the expiration of fifty years, relates exclusively to all properly enrolled Indians at the time of the passage of the said act and such of their descendants as may be born to them as members of their tribe and properly enrolled as such.

This conclusion is borne out by the many rulings of the department under which certain children of mixed blood parents have been denied enrollment with the tribe to which their mothers belong, and other children born among the tribe have been granted 67 such rights—such decision or rulings have been based primarily on the case of Julia B. Oakes et al., v. United States (172 Fed. Rep. 305).

A careful reading of the Oakes case shows clearly that the court had under consideration the said act of January 14, 1889, and held that the issue of mothers once enrolled with the Chippewa of the White Earth Reservation, where such issue was born apart from the reservation, were not entitled to tribal benefits.

Furthermore, the general rule laid down in the Kadrie case was not called for by the particular facts of that case, and anything said beyond that requirement is dictum and not controlling, especially as

it is not in accord with the existing construction placed upon the act of 1889, and uniformly followed for many years prior to the time the opinion in said case was rendered. The mother of claimants there involved was born on the reservation, was a recognized and enrolled member of the tribe, "her three oldest children were for some years enrolled among the Chippewa Indians, and she was paid annuities for them until 1917, etc." This is a very different situation from that presented by the broad rule laid down in the Kadrie case, holding that all children shall be enrolled for interest payments and shares in the final distribution of the permanent fund created by the act of 1889, so long as they may be able to show a degree of Indian blood derived from an originally enrolled member of the tribe, regardless of the fact that some of those through whom they immediately claim were not born to membership in the tribe, never had any tribal relations or affiliations and were never recognized as members; all of which is directly opposed to the fundamental rule declared in decisions of the Department and the courts that tribal rights are not so vested or inherent that they may not be forfeited or abandoned. In other words, the Kadrie opinion is not limited to the children of parents who once had tribal relations and abandoned the same, but permits descendants in general, including the children of those who never were members of the tribe, to participate in annuities and final distribution of the principal fund. Besides, there is nothing in the act of 1889 necessarily calling for the construction of the word "issue"—that is, that it was used
68 its enlarged not its restricted sense—placed upon it in the Solicitor's opinion of February 17, 1919. Webster's definitions of the word are "progeny;" "a child or children;" "offspring." "In law, sometimes, in a general sense, all persons descended from a common ancestor; all lineal descendants; also any one of such persons."

In the connection in which the term "issue" appears in the act of 1889 it does not necessarily have to be construed as having been used in its enlarged or unlimited sense. There is abundant authority to the effect that in its primary sense the word means "children" or direct issue, and when not qualified it also includes grand children. It is only in its secondary meaning that the word has been held to include the issue of issue in an indefinite descending line (23 Cyc. 359, 363), and notes.

Judged by the construction theretofore put upon the legislation as pointed out herein, and as there is nothing conclusively showing that Congress actually used the word in its enlarged sense or intended by the act of 1924 to disturb former practice and decisions, the word was undoubtedly used in the act of 1889 in its restricted sense. In that sense the word means qualified issue. When so constructed no reasonable inference can be drawn from the act of 1889 that any of the funds arising thereunder were to be paid to any person who was never a member of any tribe or band of Chippewa Indians in Minnesota or entitled to such membership.

As to the character of Indian tribal property the Court of Claims in Journeycake v. Cherokee Nation (24 Ct. of C. 281, 302), after stating as a fact that all Indian lands were communal property, says: "The distinctive characteristic of communal property is that every member of the community is an owner of it as such. He does not take as heir, or purchaser, or grantee; if he dies, his right of property does not descend; if he removes from the community, it expires; if he wishes to dispose of it he has nothing which he can convey; and yet he has a right of property, in the land as perfect as that of any other person; and his children after him would enjoy all that he enjoyed, not as heirs but as communal owners * * *.

Upon appeal the decree of the Court of Claims was affirmed by the Supreme Court (Cherokee Nation v. Journeycake, 155 U.
69 S. 196.) This court did not discuss the incidents of communal property, but did speak of the lands as being the common property of the Cherokee Nation, in which all members and citizens are alike interested and alike entitled to share in the profits and proceeds thereof.

The only way to arrive at a conclusion as to what Congress really intended as to the fund in question is to consider the other provisions of the act of 1889 and the construction placed upon the same and similar acts for the disposal of tribal property. The opinion of 1919 construes the provisions of section 7 independently of such consideration. The opinion declined to determine whether or not annuity payments or the final distribution of the permanent fund should be made per capita or per stirpes. The law clearly contemplates that interest payments and final distribution shall be made per capita. This is significant, when analyzed, in indicating that it could not have been the intention for the law to have such a far-reaching effect as that given it by said opinion.

The crux of the issue here turns primarily on the language in section 7 of the act of 1889: "To all of said Chippewa Indians and their issue then living (at the end of the 50-year period) in cash in equal shares. Equal shares of course, present no difficulty. The difficulty, if any, rests in the words "all of said Chippewa Indians and their issue then living." Does this mean the Indians originally enrolled by the Chippewa Commission and the issue of such Indians who may be living at the expiration of the period stated? It has been so contended and the Solicitor's opinion of February 17, 1919, holds, in effect, that a modicum of Chippewa blood of an ancestor whose name appears on the original Chippewa rolls is all sufficient to entitle such a claimant to an equal share in the common Chippewa fund. Under such ruling membership in the tribe is not a controlling or even a determining factor. One drop of Chippewa blood of an enrolled ancestor, ipso facto, entitles the possessor to an "equal share" regardless of membership, tribal affiliation, recognition, residence, or any other requirement. In my view Congress did not intend any such result but that by the act of 1889 Congress simply contemplated a distribution of lands

(allotment) to the members of this tribe then living and a
70 like distribution of the tribal funds at the expiration of the 50-year period to the members of the tribe then living. In either event membership in the tribe must of necessity be the determining factor. Recent acts of Congress (42 Stat. 221; 43 Stat. 798), authorized per capita payments from the principal fund to the credit of the Chippewa Indians in Minnesota arising under section 7 of the act of January 14, 1889 "to each enrolled member of the tribe under such rules and regulations as the Secretary of the Interior may prescribe." This should dispose of any question but that these funds are still "tribal" and that membership in the tribe is an essential requirement to participation therein.

In view of the foregoing my opinion is that the applicatior of Mrs. Andrews should be denied, and that the Solicitor's opinion of February 17, 1919, in so far as it conflicts with prior rules, practice, and decisions in the matter of determining rights and claims to share in the common property of the Chippewa tribe of Indians in the State of Minnesota, should no longer be followed.

Respectfully,

(Signed) E. O. PATTERSON,
Solicitor.

Approved January 8, 1927.
(Signed) JOHN H. EDWARDS,
Assistant Secretary.

71 In court of appeals of the District of Columbia

APRIL TERM, 1928

No. 4780

UNITED STATES OF AMERICA Ex Rel. Mary I. Kadrie, Evelina Kadrie, Amit K. Kadrie, et al., Appellants

vs.

HUBERT WORK, Secretary of the Department of the Interior of the United States

Motion for substitution of appellee

Filed Aug. 21, 1928

Comes now the appellants in the above-entitled cause, by their attorney, Webster Ballinger, and represent to the Court that on or about July 24, 1928, Hubert Work, Secretary of the Department of the Interior of the United States, appellee named in the pending cause, retired from said office as Secretary of the Department of the Interior of the United States, and that on or about July 25, 1928, Roy O. West succeeded to said office: Wherefore, under the authority contained in Sec. 11–a of the act approved February 13, 1925 (43

Stat. at L., at 941), appellants move the substitution of Roy O. West, Secretary of the Department of the Interior of the United States, as appellee in said cause pending on appeal.

(Signed) WEBSTER BALLINGER,
Attorney for Appellants.

No objections:
(Signed) E. O. PATTERSON,
(Signed) O. H. GRAVES,
Attorneys for Appellee.

[File indorsement omitted.]

73 In Court of Appeals of District of Columbia

[Title omitted.]

Order substituting party appellee August 23, 1928.

The retirement of Hubert Work and the appointment of Roy O. West as Secretary of the Interior having been suggested, it is on motion filed herein now here ordered by the Court that Roy O. West, Secretary of the Interior, be, and he is hereby, made party appellee in the above-entitled cause in the place and stead of Hubert Work, retired.

74 In Court of Appeals of District of Columbia

[Title omitted.]

Argument and submission November 7, 1928.

The argument in the above-entitled cause was commenced by Mr. Webster Ballinger, attorney for the appellants, and was continued by Mr. O. H. Graves, attorney for the appellee, and was concluded by Mr. Webster Ballinger, attorney for the appellants. On motion the appellants are allowed to file additional authorities herein if so advised.

75 In Court of Appeals of the District of Columbia

[Title omitted.]

Before Martin, Chief Justice; Robb and Van Orsdel, Associate Justices

Opinion

Filed February 4, 1929

Mr. JUSTICE VAN ORSDEL delivered the opinion of the court

VAN ORSDELL, Associate Justice: Appellants, plaintiffs below, filed a petition in the Supreme Court of the District of Columbia for a writ of mandamus to compel the defendant, Secretary of the Interior, to restore the names of the relators to the supplemental rolls of the Chippewa Indians in the State of Minnesota, and to pay them

their per capita share in all future money payments that may hereafter be made from the funds now in the Treasury of the United States belonging to said Indians.

From a judgment in favor of the defendant, this appeal was taken.

By the act of Congress of January 14, 1889, 25 Stat. 642, the United States submitted a proposal to all the different bands or tribes of Chippewa Indians in the State of Minnesota, with the
76 view of locating them upon the White Earth and Red Lake Reservations. The act provided, among other things, for a commission to negotiate with the Indians, scattered in different bands throughout the State of Minnesota, for the relinquishment and cession of their lands, in lieu of rights to be accorded them under the act, in the Red Lake and White Earth Reservations.

It appears that the relators are the minor children of Sarah Kadrie, who was the daughter of Mary Blair, a member of the White Earth Band of Chippewa Indians in Minnesota, and who was duly enrolled as such in the census roll made by the commissioners under the act of 1889, and as such was entitled to and participated in the allotment of lands under said act. In 1892 there was born to Mary Blair, in lawful wedlock, Sarah Cogger, mother of relators, who was enrolled on the supplement rolls, and who has at all times received her per capita share of all money payments made under the 1889 act. In 1909 Sarah Cogger, while attending an Indian school, was married to one Mall Kadrie, a naturalized citizen of the United States, and the relators are the children of this marriage. Following the respective births of the relators, Mary I. Kadrie, Evelina Kadrie, and Amit K. Kadrie, their names were entered upon the rolls by the proper officers of the United States, pursuant to the practice then in force of enrolling the lineal issue of the original enrolled and allotted ancestor.

77 The act of 1889 provides:

"That in any case where an allotment in severalty has heretofore been made to any Indian of land upon any of said reservations, he shall not be deprived thereof or disturbed therein except by his own individual consent separately and previously given, in such form and manner as may be prescribed by the Secretary of the Interior."

Section 3 of the act provides:

"That as soon as the census has been taken, and the cession and relinquishment has been obtained, approved, and ratified as specified in section 1 of this act, all of said Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, shall, under the direction of said commissioners, be removed to and take up their residence on the White Earth Reservation, and thereupon there shall, as soon as practicable, under the direction of said commissioners, be allotted lands in severalty to the Red Lake Indians on Red Lake Reservation, and to all other Indians on White Earth Reservation. In conformity with the act of February eighth, eighteen hundred

eighty-seven, entitled 'An act for the allotment of lands in severalty to the Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes'; and all allotments heretofore
78 made to any of the said Indians on the White Earth Reservation are hereby ratified and confirmed with the like tenure and condition prescribed for all allotments under this act."

The act then provides that Indians who desire may take allotments on the reservation where they lived at the time of the removal instead of being removed and taking an allotment on the White Earth Reservation. This privilege accorded the Indians of taking allotments on the reservation where they lived, as well as the right accorded those already having allotments to retain the same, is in accord with the general policy theretofore adopted by the Government of inducing the Indians to abondon their tribal relations and adopt the customs of civilized life. We are, however, only indirectly concerned in this case with the matter of allotments since the relief here sought is against certain funds standing to the credit of the Chippewa Indians in the Treasury of the United States, derived from the sale of lands belonging to the Indians in excess of the allotments made under the act.

Section 7 of the act in part provides as follows:

"That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the survey and appraisals, in this act provided, be placed in the
79 Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; * * * and at the expiration of said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."

In accordance with a recommendation made by the Indian agent at the White Earth Reservation in 1916, the names of these relators were stricken from the rolls. Thereafter the mother, Sarah Kadrie, petitioned the Secretary of the Interior for a revocation of the order striking relators names from the rolls. The matter was referred to the Solicitor of the Department of the Interior for an opinion determinative of their rights. The solicitor in his opinion, in passing upon the rights of relators, said:

"In the particular case giving rise to a call for this opinion,
80 Sarah Kadrie, nee Cogger, was a full-blood Chippewa Indian woman born on the reservation in the year 1892—subsequent to the cession and the original enrollment. She was an only child of her mother, a member of the original enrollment. As such, she is entitled to participate for herself in the annuities; and that right is accorded to her. She married, in 1909, Mall Kadrie, a native of Syria, and since then has resided with him mainly in Canada, but for a short time in Syria—and at no time on the reservation, although occasionally visiting it. There have been born of said marriage four children, the oldest now about nine years of age. Her three oldest children were for some years enrolled among the Chippewa Indians, and she was paid annuities for them, until the year 1917, when, by direction of the Indian Bureau, their names were stricken from the roll and their annuities withheld. At the same time, the enrollment of the youngest child was refused. In my opinion, this action was erroneous, and should be corrected. Sarah Kadrie and her children are 'issue' of her mother, a full-blood Chippewa Indian duly enrolled, and as such they will be entitled, at the expiration of the trust period, to share in the distribution of the trust fund; and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited either by acquiring foreign citizenship, or failing to acquire, residence on the Indian Reservation or with the tribe."

81 In conformity with this opinion, the children of Sarah Kadrie, then living, were restored to the rolls and thereafter, in accordance with the prevailing practice, the names of the relators, Bertha, Mailivan E., Marie, Dorothy, Elmer, and Omer Kadrie were, following their respective births, duly placed upon the supplemental rolls and received their per capita share of the interest payment from the trust fund, standing in the Treasury, until 1927 when the present Solicitor of the Department of the Interior rendered an opinion in the case of one Jane B. Andrews, an applicant for enrollment, in which he expressly overruled the opinion of the former solicitor, holding in effect that the lineal issue of Chippewa Indians in Minnesota whose names appear on the rolls prepared under the authority contained in the act of 1889, were not entitled to enrollment on the supplemental rolls or entitled to participate in the per capita distribution of the funds, unless they were born to membership in the tribe or band; had lived or affiliated with the tribe or band, and had been recognized by the tribe as members thereof.

We think the solicitor was in error in overruling the decision of the former solicitor. The opinion is based chiefly upon the decision in the case of Oakes et al., vs. United States, 172 Fed. 305. In that case the right to claim allotment under the act of 1889 was involved. It appeared that two of the plaintiffs, who were by birth, members
82 of the tribe but had been taken by their parents in 1849 to Fort Ripley and later to St. Paul, where they thereafter resided and were married to white men. They had not resided on the

Indian reservation since 1849 and were residents of St. Paul when the act of 1889 was passed. Shortly thereafter they asserted their right to allotments under the act, and, in 1894 their names were placed upon the supplemental census as White Earth Mississippi Chippewa Indians. These appellants were held to be entitled to allotments.

The two remaining plaintiffs, who were daughters of one of the appellants aforesaid, were born in St. Paul; had never been recognized by the Indians; had never lived on the Indian reservation; were never members of the tribe, and had never asserted any rights by virtue of Indian blood until, in this case, they sought allotments. As to these two plaintiffs, the court held that they were not entitled to allotments under the act of 1889.

We think the decision in the Oakes case is not controlling here. In that case the court was considering rights to allotments under the act of 1889. Of course, the only Indians entitled to allotments were Chippewa Indians then living in the State of Minnesota. The after born issue of these Indians would have no standing in securing allotments under the act. But section 7 of the act, relating to the placing of the funds in the Treasury and the distribution of the interest arising from the funds and of the fund itself at the termination of 50 years, treats of a different matter. It looked to and contemplated conditions that might arise in the meantime, not to conditions present at the time the act was passed; and, for that reason, provision was made for the distribution of this fund "to the Chippewa Indians and their issue, then living, in cash, in equal shares."

83

We think this provision of the statute must be read in connection with the policy Congress had established at that time in relation to the Indians. The act of Congress, March 3, 1875, 18 Stat. 420, which established the benefits of the homestead law to "any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, * * * shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations."

And, section 6 of the act of February 8, 1887, 24 Stat. 388, provides: "And every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether the said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the rights of any such Indian to tribal or other property."

84

This liberal policy extended by Congress for the purpose of breaking up and destroying the Indian tribal relation, and inducing them

to adopt the habits of civilized life, is emphasized by the act of August 9, 1888, 25 Stat. 392, which declares that a tribal Indian woman, hereafter marrying a citizen of the United States shall thereby become a citizen of the United States, with all the rights, privileges, and immunities of such a citizen, without in any way impairing or affecting her right to any tribal property or any interest therein.

Sarah Kadrie, the mother, under this act, by her marriage to a naturalized citizen of the United States, became likewise a citizen of the United States; and, availing herself of the inducement offered in the acts of Congress, left the Indian reservation to take up and adopt the habits of civilization. The relator children were born under these circumstances, and should be given, we think, the benefits to be derived from a reasonable interpretation of the statutes.

Mr. Justice Van Devanter, in his opinion in the Oakes case, referring to the effect of the statutes above cited, said:

"These acts disclose a settled and persistent purpose
85 on the part of Congress so as to broaden the original rule respecting the rights to share in tribal property as to place individual Indians who have abandoned tribal relations, once existing, and have adopted the customs, habits, and manners of civilized life, upon the same footing, in that regard, as though they had maintained their tribal relations. Not only this, but these acts, omitting that of 1865, are general and continuing in their nature, and therefore are as applicable to the Chippewas in Minnesota as to other Indians, unless the act of 1889 discloses, either expressly or by necessary implication, that Congress intended otherwise. In our opinion that act does not thus disclose such an intention. True, it speaks of the Indians concerned as 'bands or tribes,' provides that all, save those on the Red Lake Reservation, 'shall * * * be removed' to the White Earth Reservation, and is entitled 'An act for the relief and civilization of the Chippewa Indians in the State of Minnesota'; but the inference sought to be drawn therefrom, namely, that only tribal and uncivilized Indians are to have the benefits of the act, is materially weakened when we turn to other provisions, such as those directing that enough lands be withheld from the contemplated cession 'to make and fill the allotments required by this and exist-
86 ing acts,' and that the allotments be made 'in conformity with' the act of February 8, 1887, which expressly recognizes the right of individual Indians, who have abandoned their tribal relations and have adopted the customs, habits, and manners of civilized life, to share in tribal property. An inference of such uncertain strength is not enough to overcome the general aversion to repeals by implication, especially where a settled policy in legislation is involved and no reason for disturbing it is apparent."

Referring again to the provision of section 7 relative to the disposition of the funds "placed in the Treasury of the United States to the credit of all the Chippewa Indians, in the State of

Minnesota, as a permanent fund," it is apparent that when the fund was so deposited, this limitation was not carried into the division of the permanent fund, since it is provided that it "shall be divided and paid to all said Chippewa Indians and their issue then living." This comprehends all the issue, direct and lineal, of the Chippewa Indians living in Minnesota in 1889, wherever living or wherever located. The inducement to sever the tribal relation and establish the habits of civilization, as afforded by the statutes, was accorded by Congress without requiring that residence should be confined to the State of Minnesota. Consequently, no limitation in that respect appears in the act. It, therefore, becomes immaterial
87 whether the children of Sarah Kadrie were born in Canada or in Syria, as long as she retained her citizenship in the United States.

We think a reasonable interpretation of the intent of Congress justifies the extension of the privilege of this act to the lineal descendants of the Chippewa Indians, recognized as such at the time of the passage of the act of 1889, and owing to the limited period within which distribution is to be made. This does not amount to an unreasonable extension of the privilege. At the end of the fifty-year period very few of the Indians living in Minnesota in 1889 will be living to avail themselves of the distribution privileges; and, if the act is confined to their direct "issue," the number available to take would be very limited. It is, therefore, doubtful, whether the extension of this act to the lineal issue will produce a much greater number to avail themselves of the final distribution than the number that were living in 1889. We think the expression "and their issue then living" included all of the issue and, therefore, should be extended to the relators.

The judgment is reversed with costs and the cause is remanded for further proceedings not inconsistent with this opinion.

[File indorsement omitted.]

88 In Court of Appeals of District of Columbia

No. 4780. January term, 1929

UNITED STATES OF AMERICA EX REL MARY I. KADRIE, EVELINA KADRIE, Amit K. Kadrie, et al., Appellants,

vs.

ROY O. WEST, SECRETARY OF THE DEPARTMENT OF THE INTERIOR OF the United States.

Judgment

Feb. 4, 1929

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record

from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be and the same is hereby reversed with costs, and that this cause be and the same is hereby remanded to the said supreme court for further proceedings not inconsistent with the opinion of this court.

Per Mr. Justice Van Orsdel.

89 In Court of Appeals of the District of Columbia

[Title omitted.]

Motion for substitution of appellee

Filed April 24, 1929

Now comes Ray Lyman Wilbur, Secretary of the Interior, and shows to the court that Roy O. West retired as Secretary of the Interior on or about March 5, 1929, and this movant succeeded to said office on the same day.

Wherefore, he moves, under the authority granted by section 11 (a), (b), and (c) of the act of February 13, 1925 (43 Stat. 941), that the name of Ray Lyman Wilbur, be substituted for that of Roy O. West, and that said cause be continued and maintained against him as appellee herein.

Ray Lyman Wilbur,
Secretary of the Interior,
By O. H. Graves,
Assistant to the Solicitor.
Attorney for Appellee.

I consent.

Webster Ballinger,
Attorney of Appellants.

90 [File endorsement omitted.]

91 In Court of Appeals of District of Columbia

Order substituting party appellee

[Title omitted.]

April 27, 1929

The retirement of Roy O. West and the appointment of Ray Lyman Wilbur as Secretary of the Interior having been suggested, It is on motion filed herein now here ordered by the Court that Ray Lyman Wilbur, Secretary of the Interior, be made the party appellee in the above entitled cause in the place and stead of Roy O. West, retired.

92 In Court of Appeals of the District of Columbia

[Title omitted.]

Designation of record

Filed April 27, 1929

The clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above-entitled cause, including therein the following:

1. Printed record.
2. Motion to substitute Roy O. West for Hubert Work.
3. Order granting same.
4. Minute entry showing argument of the cause.
5. The opinion of the court.
6. Decree of the court.
7. Motion to substitute Ray Lyman Wilbur as appellee.
8. Order granting same.
9. This designation.
10. Clerk's certificate.

O. H. GRAVES,
Attorney for Appellee.

Service of a copy of the above designation acknowledged this 23rd day of April, 1929.

WEBSTER BALLINGER,
Attorney for Appellants.

[File endorsement omitted.]

93 [Clerk's certificate to foregoing transcript omitted in printing.]

94 Supreme Court of the United States

Order allowing certiorari

Filed June 3, 1929

The petition herein for a writ of certiorari to the Court of Appeals of the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

95 [File No. 34,186. District of Columbia, Court of Appeals. Term No. 77. Ray Lyman Wilbur, Secretary of the Interior, petitioner, vs. United States of America ex rel. Mary I. Kadrie, Evelina Kadrie, Amit K. Kadrie, et al., etc., petition for writ of certiorari and exhibit thereto. Filed May 3rd, 1929. File No. 34,186]

○

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No. [redacted] 77

In the Supreme Court of the United States

OCTOBER TERM, 1928

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR,
PETITIONER

v.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, AMIT K. KADRIE, BERTHA KADRIE, MAILIVAN E. KADRIE, MARIE KADRIE, DOROTHY KADRIE, ELMER KADRIE, AND OMAR KADRIE, BY THEIR NEXT FRIEND, MOTHER, AND NATURAL GUARDIAN, SARAH KADRIE

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

U.S. GOVERNMENT PRINTING OFFICE : 1928

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In the Supreme Court of the United States

OCTOBER TERM, 1928

No. ——.

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, petitioner

v.

UNITED STATES OF AMERICA EX REL MARY I. KADRIE, Evelina Kadrie, Amit K. Kadrie, Bertha Kadrie, Mailivan E. Kadrie, Marie Kadrie, Dorothy Kadrie, Elmer Kadrie, and Omar Kadrie, by Their Next Friend, Mother, and Natural Guardian, Sarah Kadrie

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

PETITION

The Attorney General, on behalf of Ray Lyman Wilbur, Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered in the above-entitled cause on February 4, 1929, reversing the judgment of the Supreme Court of the District of Columbia. (R. 20.)

STATEMENT

This case involves a question arising under Section 7 of the Act of January 14, 1889, c. 24, 25 Stat. 642, 645, with respect to the annual payments of income derived from the permanent fund now on deposit in the Treasury of the United States to the credit of the Chippewa Indians in the State of Minnesota, representing money accrued from the disposal of their tribal lands.

Section 1 of the Act provided for negotiations with the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession of their title to their reservations in that State, except the White Earth and Red Lake Reservations, and required the Commissioners appointed on behalf of the Government to conduct such negotiations, before securing such cession, to make an accurate census of each tribe or band in duplicate lists, one of which was to be filed with the Secretary of the Interior.

Section 3 of the Act provided that as soon as a census had been taken and the cession had been obtained, approved, and ratified in accordance with the terms of the Act, all of the Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, should be removed to the White Earth Reservation, and that as soon as practicable lands should be allotted in severalty to the Red Lake Indians on the Red Lake Reservation and to all other of said Indians on the White Earth Reservation.

Sections 5 and 6 of the Act provided for the sale and other disposition of the ceded lands by the Commissioner of the General Land Office.

Section 7 of the Act provided that the net amount of money accruing from the disposal of the ceded lands should be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which should draw interest at the rate of 5 per cent per annum, payable annually for the period of fifty years after the allotments provided for in the Act had been made. The interest and the permanent fund are to be expended for the benefit of the "*said Indians*" in the manner following: During the period of fifty years one-half of the interest, except in cases otherwise provided, is to be paid annually in cash to the heads of families and guardians of orphan minors for their use, and one-fourth of the said interest, during the same period and with like exceptions, is to be paid annually in cash in equal shares per capita to all other classes of "*said Indians.*" The remaining one-fourth of the said interest during the said period of fifty years is to be devoted to the establishment and maintenance of free schools among "*said Indians.*" Section 7 then provides that "at the expiration of the said fifty years the said permanent fund shall be divided and paid to all of said Chippewa Indians and *their issue* then living, in cash, in equal shares." (Italics supplied.)

The other provisions of the Act are not important to the questions presented by this petition.

Pursuant to the provisions of the Act Mary Blair, a mixed-blood Chippewa Indian (R. 29), was enrolled as a member of the White Earth Band of Chippewa Indians in the census roll made by the Commissioners, and thereafter received an allotment of land as such. In 1892 there was born to Mary Blair, in lawful wedlock, at Richwood, Minnesota, a daughter, Sarah Cogger. Sarah Cogger is three-eighths Indian by blood. (R. 31.)

Following the birth of Sarah Cogger her name was entered upon certain rolls kept by the Office of Indian Affairs, a bureau of the Department of the Interior, which are designated in the record of this case as supplemental rolls of the Chippewa Indians in Minnesota. (R. 5.) These rolls are known to the Office of Indian Affairs as pay rolls, and are kept pursuant to no authority or requirement of law. They are kept merely as accounting records, and as memoranda of the persons whom the Office of Indian Affairs finds are entitled to participate in the annual distribution of interest provided for in Section 7 of the Act of January 14, 1889, *supra*. The rolls in themselves, however, confer no rights upon the persons whose names appear thereon.

In 1909 Sarah Cogger was married to Mall Kadrie, a Syrian by birth and a naturalized citizen of the United States. (R. 30, 50.) At the time of her marriage Sarah Kadrie abandoned her tribal

relations and since then has resided among white people. (R. 30, 50.) For some years following her marriage she resided with her husband in Canada and for a part of the time in Syria. (R. 31, 50.)

Nine children have been born of this marriage to Sarah Kadrie. Between January 10, 1910, and March 31, 1916, her children, Mary I. Kadrie, Evelina Kadrie, Amit K. Kadrie, and Bertha Kadrie, were born in the Dominion of Canada; between March 3, 1918, and January 5, 1925, her children, Mailivan E. Kadrie, Marie Kadrie, Dorothy Kadrie, and Elmer Kadrie, were born in International Falls, Minnesota; while her youngest child, Omar Kadrie, was born on February 9, 1927, at St. Paul, Minnesota. The exact dates of birth of these children are given at page 30 of the record.

Following the births of Mary I. Kadrie, Evelina Kadrie, and Amit K. Kadrie, their names were entered upon the pay rolls of the Office of Indian Affairs, and annuity payments from the interest of the trust fund were made on their account. (R. 30, 50.) Following the birth of Bertha Kadrie, application was made by her mother, Sarah Kadrie, for her enrollment with the White Earth Chippewa Indians. (R. 30.) Pursuant to an adverse report of the superintendent of the White Earth Indian School (R. 31), under date of August 2, 1916, the Commissioner of Indian Affairs denied the application because the mother, a three-eighths

blood Chippewa Indian, had married a white man and voluntarily left her people, and her child had been born among the whites. (R. 32.) Subsequent to this ruling, and by an order of the office of Indian Affairs issued August 18, 1917, the names of Mary I. Kadrie, Evelina Kadrie, and Amit K. Kadrie were stricken from the pay rolls of that Bureau (R. 7), and payments of interest on their account were discontinued.

Thereafter Sarah Kadrie petitioned the Secretary of the Interior for a revocation of the said order of August 18, 1917. (R. 7.) The questions raised by her petition were referred to the then Solicitor of the Department for an opinion. On February 17, 1919, the Solicitor rendered an opinion in which he said that he found that the action of the Office of Indian Affairs striking the names of Mrs. Kadrie's three oldest children from the pay rolls and withholding annuities from them, and refusing enrollment to her then youngest child, was erroneous and should be corrected. (R. 46–51.)

In conformity with the Solicitor's opinion, the names of the children of Sarah Kadrie, then living, were restored and added to the pay rolls of the Office of Indian Affairs, and thereafter the names of Bertha, Mailivan E., Marie, Dorothy, Elmer, and Omar Kadrie, following their respective births, were placed upon the said rolls, and all of these nine children thereafter, and until 1927, received a share of the interest payments from the trust fund held in the United States Treasury. (R. 8.)

On January 8, 1927, a succeeding Solicitor of the Department of the Interior rendered an opinion in the case of Jane B. Andrews in which he expressly overruled the opinion of his predecessor of February 17, 1919, and in which he held that tribal membership was necessary to entitle one claiming to be a Chippewa Indian to share in the funds derived from the sale of the tribal lands. (R. 37, 51–70.)

Following the Solicitor's opinion of January 8, 1927, Mrs. Kadrie was called upon to show cause why the names of her said nine children should not be stricken from the pay rolls of the Office of Indian Affairs. After answer duly made, and due consideration thereof, the then Secretary of the Interior, under date of October 1, 1927, directed that the names of the said nine children be stricken from the pay rolls of the Office of Indian Affairs, which accordingly was done. (R. 37, 38.)

On October 17, 1927, upon the basis of the facts hereinbefore set forth, Sarah Kadrie, as the next friend, mother, and natural guardian of Mary I. Kadrie, Evelina Kadrie, Amit K. Kadrie, Bertha Kadrie, Mailivan E. Kadrie, Marie Kadrie, Dorothy Kadrie, Elmer Kadrie, and Omar Kadrie, filed a petition in the Supreme Court of the District of Columbia against Hubert Work, the then Secretary of the Interior, as respondent, wherein she prayed that the respondent be required to show cause why a writ of mandamus should not issue against him. (R. 2.)

The petition contained the express admission (R. 8):

> * * * all of relators have at all times since their respective births received their per capita shares of all money payments made from said trust fund.

The prayer of the petition was (R. 12):

> 1. That a rule issue directed to Hubert Work, Secretary of the Interior, directing him to show cause, on a day certain to be therein named, if any he may have, why a writ of mandamus should not issue commanding him to restore or cause to be restored the names of each of the relators on the supplemental rolls of the Chippewa Indians of Minnesota and to pay them their per capita shares in all future money payments that may be made under the authority contained in Section 7 of said agreements approved March 4, 1890.

After answer by the respondent (R. 13), the case was heard upon its merits on January 3, 1928. On April 12, 1928, the trial justice rendered a judgment, designated as a decree, in favor of the respondent. (R. 20.)

The relators thereupon appealed from the judgment aforesaid to the Court of Appeals of the District of Columbia. (R. 20.) On February 4, 1929, the Court of Appeals reversed the judgment of the lower court.

This petition is now presented to the end that the judgment of the Court of Appeals of the District

of Columbia may be reviewed by this Court on writ of certiorari.

QUESTIONS PRESENTED

Under the Act of January 14, 1889, c. 24, 25 Stat. 642, the fund derived from the sale of the tribal lands of Chippewa Indians in the State of Minnesota is a tribal fund held in trust by the United States, which belongs to "all the Chippewa Indians in the State of Minnesota."

Section 7 of that Act states in express terms that annual payments of interest derived from the fund shall be made to "said Indians." The question, therefore, arises whether the relators, the legitimate children of a mother having only three-eighths Indian blood, who, prior to their birth, abandoned her tribal relations, married a white man who was then a citizen of the United States, and thereafter resided continuously among white people, are Chippewa Indians in the State of Minnesota, within the meaning of the statute, who are entitled to share in the annual payments of interest derived from the tribal trust fund.

A further question is whether the Secretary of the Interior, in deciding that the relators, under the conditions stated, were not Chippewa Indians in the State of Minnesota, and, therefore, were not entitled to share in the annual payments of interest derived from the tribal trust fund, did not give such a reasonable construction to Section 7 of the Act of January 14, 1889, *supra*, as to place his action deny-

ing the relators a share in such annual interest payments beyond control by mandamus.

SPECIFICATIONS OF ERROR

The Court of Appeals of the District of Columbia erred—

1. In reversing the judgment of the court below which dismissed the relators' petition for mandamus.

2. In holding that because the relators were issue of a Chippewa Indian in the State of Minnesota, who was duly enrolled as such in the census provided for in the Act of January 14, 1889, they, themselves, were Chippewa Indians in the State of Minnesota and entitled to share in the annual payments of interest derived from the tribal trust fund.

3. In confusing the issue of Chippewa Indians in the State of Minnesota with such Indians themselves, and in holding accordingly that the relators were entitled to share in the annual payments of interest derived from the tribal trust fund.

4. In considering questions of genealogy respecting the issue of Chippewa Indians in the State of Minnesota, which will not arise for determination until the expiration of the 50-year trust period fixed by the Act of January 14, 1889, and upon final distribution of the tribal trust fund, and in making such questions the basis for a determination that the relators have a present right to share in the annual payments of interest which are derived from the tribal trust fund.

5. In attempting by mandamus to control the Secretary of the Interior in the exercise of his authority to place a reasonable construction upon an Act of Congress relating to matters committed to the jurisdiction of his Department by Congress, and in thereby preventing him from acting in accordance with such construction.

6. In directing a writ of mandamus to issue pursuant to a petition which failed to state a cause of action.

7. In directing a writ of mandamus to issue requiring the Secretary of the Interior to restore the names of the relators to certain rolls of the Indian Bureau in the absence of proof that such rolls were kept in accordance with the requirement of law, or that it was a ministerial duty of the Secretary to place the names of the relators thereon.

8. In directing a writ of mandamus to issue requiring the Secretary of the Interior to make payments of money to the relators in the future.

REASONS FOR GRANTING THE WRIT

The reasons why the writ should issue are:

1. The question decided by the Court of Appeals of the District of Columbia is one of general importance. The result of the court's decision is not confined to the nine relators in this case, as in effect it establishes the right of all other persons in a like situation with the relators to share in the annual payments of interest derived from the tribal trust fund of the Chippewa Indians in Minnesota.

It is a matter of great moment to those Indians, and to the Secretary of the Interior as the guardian of their rights, that the amounts payable to them annually and derived from a fund representing the proceeds of the sales of their tribal lands shall not be diminished through the payment of money to persons not entitled by law to receive such payments.

2. The question at issue is one which has given rise to a diversity of opinion by those learned in the law. A former Solicitor of the Department of the Interior, and the Judge of the Supreme Court of the District of Columbia before whom this case was tried, have expressed opinions in exact opposition to that entertained by the Court of Appeals of the District of Columbia.

3. The question decided by the Court of Appeals of the District of Columbia relates to the construction of a statute of the United States, to wit, the Act of January 14, 1889. The question presented to the Court of Appeals and decided by it has never been considered or settled by this Court. In view of its general importance it apparently should be settled by this Court.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia should be granted.

WILLIAM D. MITCHELL,
Attorney General.

MAY, 1929.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The memorandum opinion and the decree of the Supreme Court of the District of Columbia are found at page 20 of the record. The opinion of the Court of Appeals of the District of Columbia is reported in 30 F. (2d) 989.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1929.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

Section 7 of the Act of January 14, 1889, c. 24, 25 Stat. 642, 645, provides:

> That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided

for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares.

ARGUMENT

I

THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA BASED ITS DECISION UPON A MISCONCEPTION OF THE QUESTION AT ISSUE. SPECIFICATIONS OF ERROR NOS. 1, 2, 3, AND 4

Section 7 of the Act of January 14, 1889, contains two distinct provisions relative to the proceeds of the sale of the tribal lands of the Chippewa In-

dians in the State of Minnesota, now held as a trust fund in the Treasury of the United States. One of those provisions relates to the disposition of the income derived from the fund while it is held in trust. The other provision relates to the disposition of the fund itself at the expiration of the fifty-year period fixed by the statute.

With respect to the income of the fund, it is provided that during the fifty-year trust period one-half of the interest derived from the fund shall be paid annually to the heads of families and the guardians of orphan minors for their use; that one-fourth of the interest shall be paid in equal shares per capita to all other classes of the said Indians; while the balance of the annual interest is to be used for the purposes of Indian schools.

It is plain, therefore, that in order to entitle any person to share in the income derived from the trust fund, a satisfactory showing must be made that he or she belongs to some of the above groups or classes of Chippewa Indians in the State of Minnesota, as contemplated by the Act.

With respect to the final disposition of the fund at the expiration of the fifty-year trust period, the provisions of the Act are much broader. It is provided that at the expiration of the said fifty years the permanent fund shall be divided and paid to all of said Chippewa Indians and *their issue* then living, in cash, in equal shares. The distinction is obvious. During the fifty-year trust period the fund

derived from the sale of the tribal lands evidently is intended to serve the same purpose which the lands themselves would have served had they remained in the possession of the tribes; that is to say, the Chippewa Indians, considered in a tribal sense, are to be maintained and supported by the increment of a fund which, from the standpoint of equity, still may be considered as the land which once supported them and their ancestors.

When the fund finally is released from the trust at the expiration of the fifty-year period, a different situation arises, and a different provision for its disposition is made by the statute. It is then, at the end of said fifty-year trust period, and not until then, that the "issue" *then living* of the tribal Chippewa Indians contemplated by the statute become entitled to participate in the distribution of the fund.

It was the failure to recognize this distinction which led the Court of Appeals of the District of Columbia into error. The Court said in the final paragraph of its opinion:

> We think a reasonable interpretation of the intent of Congress justifies the extension of the privilege of this act to the lineal descendants of the Chippewa Indians, recognized as such at the time of the passage of the Act of 1889, and owing to the limited period within which distribution is to be made, this does not amount to an unreasonable extension of the privilege. At the end of the 50-year period, very few of the

> Indians living in Minnesota in 1889 will be living to avail themselves of the distribution privileges; and, if the Act is confined to their direct "issue" the number available to take would be very limited. It is, therefore, doubtful whether the extension of this Act to the lineal issue will produce a much greater number to avail themselves of the final distribution than the number that were living in 1889. We think the expression "and their issue then living" includes all of the issue and, therefore, should be extended to the relators.

It is apparent, therefore, that the Court of Appeals determined that the relators were entitled to share in the annual payments of interest derived from the tribal trust fund, not because they were in fact Chippewa Indians, but because they were the lineal descendants of a Chippewa Indian, and that the court thus gave the statute a construction in direct opposition to its express wording.

II

THE RELATORS IN THIS CASE ARE NOT CHIPPEWA INDIANS IN EITHER A POLITICAL OR RACIAL SENSE, AND MUCH LESS SO IN THE SENSE THAT THOSE WORDS ARE USED IN THE ACT OF 1889. CONSEQUENTLY THEY ARE NOT ENTITLED TO SHARE IN INTEREST PAYMENTS

The relators are of thirteen-sixteenths white blood and are of only three-sixteenths Indian blood, and consequently would be considered as white persons under the majority of State statutes having reference to race. Politically they probably should be

considered as Syrians, as their father, a native of Syria, apparently lived out of the United States after his naturalization for a sufficient length of time to raise a presumption of the forfeiture of his American citizenship. If they are not Syrians, they are citizens of the United States, but in no political sense are they Indians.

Nor are they to be regarded as Chippewa Indians within the meaning of the Act of 1889. Bearing in mind that the agreements contemplated by that Act were made with the Chippewa Indians of Minnesota in their tribal capacity and not merely as individuals, it is plain that since there is nothing in said Act warranting a contrary conclusion, the words "Chippewa Indians in the State of Minnesota," as used in the Act of 1889, must be interpreted and construed as meaning Chippewa Indians who maintain their tribal relations in that State. It is not then sufficient that the relators possess a given quantum of Chippewa Indian blood in order to bring them within that description. The facts in this case show that they were born to a white father after their part Indian-blood mother had permanently severed her tribal relations, and that they have always lived with him among white people and removed from all tribal associations. Clearly they are not members of the tribe to which their mother once belonged, nor are they members of any other tribe. Consequently, even if they were regarded as Chippewa Indians in a racial sense, there would be no justifi-

cation for regarding them as included within the meaning of those words as used in the Act of 1889.

The facts in the recent case of *Pape* v. *United States,* 19 F. (2d) 219, in which this Court denied a petition for certiorari, 275 U. S. 532, were much like those in the instant case, although the question at issue arose under a different law. The court said (p. 220):

> We find no authority to sustain the construction that, when an Indian woman married a white man after the act of 1897, and thereafter abandoned her tribal relations and adopted the customs and habits of civilized life, children born to her after such abandonment, who have never been recognized as members of the tribe to which the mother belonged, have the same rights as the mother would have had if she had been affiliated with the tribe at the time of her marriage.

The decision in the case of *Oakes* v. *United States,* 172 Fed. 305, rendered by Mr. Justice Van Devanter of this Court, who was then a circuit judge, also is in point. The decision in the *Oakes case* was made the basis for the Solicitor's Opinion of January 8, 1927, hereinbefore referred to.

III

IT BEING NECESSARY FOR THE SECRETARY OF THE INTERIOR TO DETERMINE BY CONSTRUCTION WHO WERE ENTITLED TO RECEIVE INTEREST PAYMENTS UNDER SECTION 7 OF THE ACT OF JANUARY 14, 1889, AND HIS CONSTRUCTION OF THE ACT IN THAT RESPECT BEING REASONABLE AND NEITHER ARBITRARY NOR CAPRICIOUS, HIS ACTION IN ACCORDANCE WITH SUCH CONSTRUCTION IS NOT SUBJECT TO CONTROL BY MANDAMUS. SPECIFICATION OF ERROR NO. 5

Before the Office of Indian Affairs, under the supervision of the Secretary of the Interior, could make payments of the interest accruing annually upon the tribal trust fund of the Chippewa Indians in Minnesota, it was necessary for the Secretary to determine what persons, as a class, were entitled to receive such payments.

The Act stated in plain words that the interest payments were to be made to Chippewa Indians. It, therefore, became necessary for the Secretary to determine who Chippewa Indians were. After careful consideration, and upon advice from the Solicitor of his Department, the Secretary determined that the children of a white father who were born outside of any tribal relation, as were the relators, were not Chippewa Indians within the meaning of the statute, even though they were the issue of a Chippewa Indian ancestor. This conclusion was reached after the mother and natural guardian of the relators had been heard in their behalf, and it was neither capricious nor arbitrary, but, on the contrary, it was a reasonable construction of the

statute which was justified and made possible by the express language of the statute itself.

This Court said in the case of *Hall* v. *Payne*, 254 U. S. 343, 347–348:

> It is manifest from this statement that the petition presents a controversy over the true construction of the Act of 1894. From the act, and the Secretary's decision, it is apparent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. The direction of the act that the lands be reserved "from any *adverse* appropriation" means necessarily an appropriation adverse to the State, and this gives color to the Secretary's view. He could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus.

The same principle was recognized in *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316; *Ness* v. *Fisher*, 223 U. S. 683, and in other cases decided by this Court.

It is true that for a short time a different construction, favorable to the relators, was placed upon the statute in conformity with the views of a

former Solicitor. That fact, however, involves no element of estoppel, as it worked to the profit and advantage, and not to the injury, of the relators. As they thereby were enabled to obtain money which they can not be required to repay, they certainly have no cause for complaint.

IV

THE RELATORS' PETITION DISCLOSES NO STATE OF FACTS WHICH JUSTIFIES THE ISSUANCE OF A WRIT OF MANDAMUS. SPECIFICATIONS OF ERROR NOS. 6, 7, AND 8

The first paragraph of the decision of the Court of Appeals of the District of Columbia reads as follows:

> Appellants, plaintiffs below, filed a petition in the Supreme Court of the District of Columbia, for a writ of mandamus to compel the defendant, Secretary of the Interior, to restore the names of the relators to the supplemental rolls of the Chippewa Indians in the State of Minnesota, and to pay them their per capita share in all future money payments that may hereafter be made from the funds now in the Treasury of the United States belonging to said Indians.
>
> From a judgment in favor of the defendant, this appeal was taken.

As all relief prayed was denied by the trial court (R. 20), and as the judgment of that court was reversed *in toto,* the inference is that the Court of Appeals entertained the opinion that the relators had a mandatory right to have their names restored to the so-called supplemental rolls of the

Chippewa Indians in the State of Minnesota, and that they also had a right to insure the payment of money to them in the future through the medium of mandamus.

It also apparently was the understanding of the Court of Appeals that the right of the relators to share in the final distribution of the trust fund at the expiration of the fifty-year period in some way depended upon the presence of their names upon the so-called supplemental rolls.

There is, however, nothing in the pleadings or proof tending to show that it was the official duty of the Secretary of the Interior to place the names of the respondents upon any so-called supplemental rolls of the Chippewa Indians in the State of Minnesota, or that it was his duty to keep any such rolls at all. It is certain that no such duty is imposed by the Act of January 14, 1889, as the only rolls provided for in that Act were the census rolls to be made by the Commissioners who conducted the negotiations with the Chippewa Indians.

It is true, as previously stated, that the Office of Indian Affairs for its own convenience and information has kept and still keeps pay rolls upon which the names of Chippewa Indians whom that office considers entitled to receive annual payments of interest are entered. But those pay rolls are not kept pursuant to law, and no one has a statutory or other right to insist that his or her name shall appear thereon.

In default of a showing by the relators that it was the ministerial duty of the Secretary of the Interior to keep supplemental rolls of the Chippewa Indians in the State of Minnesota, and that in addition thereto it was his ministerial duty to enter their names upon such rolls, the Court of Appeals of the District of Columbia should not have granted the relators' prayer for a writ of mandamus to compel the Secretary of the Interior to do so.

In paragraph 7 of the relators' petition for mandamus (R. 8) they state that all of them had at all times since their respective births received their per capita shares of all money payments made from the trust fund. This was only another way of stating that there was no default by the Secretary of the Interior with respect to the payments to them at the time their petition was filed. It further appears (R. 12) that their prayer for relief was that the Secretary of the Interior be compelled by mandamus to pay the relators their per capita share in all future money payments that might be made under the authority of a certain agreement.

It is elementary law that the duty to pay money in the future is not one which can be enforced by mandamus. High's Extraordinary Legal Remedies (3d ed.), Section 12, states the law on the subject as follows:

> Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ

> will refuse to perform their duty when the proper time arrives. It is therefore incumbent upon the relator to show an actual omission on the part of the respondent to perform the required act; and since there can be no such omission before the time has arrived for the performance of the duty, the writ will not issue before that time. In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands, and no threats or predetermination can take the place of such default before the time arrives when the duty should be performed; nor does the law contemplate such a degree of diligence as the performance of a duty not yet due.

By reason of what has just been said, this petitioner contends that the relators' petition for mandamus failed to state a case which justified the issuance of the writ, and that it was plainly error for the Court of Appeals, through the reversal of the judgment of the lower court, to, in effect, grant the prayer of the relators to that end.

CONCLUSION

The petitioner is convinced that the judgment of the Court of Appeals of the District of Columbia in the instant case was wrong, and that its enforcement will compel the payment of money rightfully belonging to the Chippewa Indians of Minnesota to persons not lawfully entitled to receive it. He re-

quests, accordingly, that the decision complained of may be reviewed by this Court upon certiorari.

Respectfully submitted.

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Attorney General.

ALFRED A. WHEAT,
Special Assistant to the Attorney General.

SETH W. RICHARDSON,
Assistant Attorney General.

E. C. FINNEY,
Solicitor, Department of the Interior.

PEDRO CAPÓ-RODRÍGUEZ,
Attorney.

MAY, 1929.

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CHARLES ELMORE

No. 77

In the Supreme Court of the United States

OCTOBER TERM, 1929

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, AMIT K. KADRIE, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 77

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, petitioner

v.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, Evelina Kadrie, Amit K. Kadrie, et al., etc.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The memorandum opinion and the decree of the Supreme Court of the District of Columbia are found at page 14 of the printed record. The opinion of the Court of Appeals of the District of Columbia (R. 52–58) is reported in 30 F. (2d) 989.

JURISDICTION

The judgment of the Court of Appeals was entered on February 4, 1929. (R. 58–59.) The petition for certiorari was filed May 3, 1929, and

granted June 3, 1929. (R. 60.) The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Whether the relators and appellants below, respondents herein, are entitled to share in the annual interest payments, made in conformity with Section 7 of the Act of January 14, 1889, *infra;* and whether the Secretary of the Interior in deciding that the relators, under the conditions hereinafter stated, were not "Chippewa Indians in the State of Minnesota" within the meaning of that section and, therefore, were not entitled to share in such annual interest payments, did not give to said section such a reasonable construction as to place his action in denying the relators a share in the said annual interest payments beyond control by mandamus.

STATUTES INVOLVED

The Act of January 14, 1889, c. 24, 25 Stat. 642, entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota" provided in Section 1 thereof for the appointment by the President of commissioners to negotiate with "all the different bands or tribes of Chippewa Indians in the State of Minnesota" for the complete cession and relinquishment of "all their title and interest in and to all the reservations of said Indians" in that State, except the White Earth and Red Lake Reservations, "for the purposes and

upon the terms" thereinafter stated. Section 1 also provided that for the purpose of ascertaining whether the proper number of Indians, as required by that section, had given their assent to the cession, "and for the purpose of making the allotments and payments" thereinafter mentioned, the commissioners, while engaged in securing such cession and before completing the same, were to make an "accurate census of each tribe or band" in duplicate lists, one of which was to be filed with the Secretary of the Interior.

Section 3 of the Act provided that as soon as the census referred to above had been taken and the cession had been obtained, approved, and ratified, in accordance with the terms of the Act, all of the Chippewa Indians in the State of Minnesota, except those on the Red Lake Reservation, should be "removed to and take up their residence on the White Earth Reservation," and that, as soon as practicable, lands should be allotted "in severalty to the Red Lake Indians on Red Lake Reservation, and to all the other of said Indians on White Earth Reservation," in conformity with the provisions of the General Allotment Act of February 8, 1887, c. 119, 24 Stat. 388.

Sections 5 and 6 of the Act provided for the sale by the Commissioner of the General Land Office of the ceded lands not allotted nor reserved for the use of said Indians or otherwise disposed of by the Act.

Section 7 of the Act reads in part as follows:

> That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: One-half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for

> their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: * * *

Other statutory provisions having some direct or indirect bearing on the questions presented in this case will be referred to in the argument.

STATEMENT

Respondents filed a petition for mandamus to compel the Secretary of the Interior to pay to the relators, respondents herein, their alleged per capita shares in all future money payments that may be made under the authority of Section 7 of the Act of January 14, 1889, *supra.*

The material facts in the case are as follows:

Pursuant to the above provisions of the Act of January 14, 1889, *supra,* Mary Blair, a mixed-blood Chippewa Indian, was enrolled as a member of the White Earth Band of Chippewa Indians in the census roll made by the Commissioners, and thereafter received an allotment of land as such. (R. 20–21.) In 1892 there was born to Mary Blair, in lawful wedlock, at Richwood, Minnesota, a daughter, Sarah Cogger. (R. 21.) Sarah Cogger is three-eighths Indian by blood. (R. 22.)

Following the birth of Sarah Cogger, her name was entered upon certain rolls kept by the Office of Indian Affairs, a bureau of the Department of the Interior, which are designated in the record

of this case as supplemental rolls of the Chippewa Indians in Minnesota. (R. 3.) These rolls are known to the Office of Indian Affairs as pay rolls, and are kept pursuant to no authority or requirement of law. They are kept merely as accounting records and as memoranda of the persons whom the Office of Indian Affairs finds are entitled to participate in the annual distribution of interest provided for in Section 7 of the Act of January 14, 1889, *supra*. The rolls in themselves confer no rights upon the persons whose names appear thereon.

In 1909, Sarah Cogger was married to Mall Kadrie, a Syrian by birth and a naturalized citizen of the United States. (R. 21, 36.) At the time of her marriage Sarah Kadrie abandoned her tribal relations and since then has resided among white people. (R. 4, 36.) For some years following her marriage she resided with her husband in Canada and for a part of the time in Syria. (R. 5, 36.)

Nine children have been born of this marriage to Sarah Kadrie. Between January 10, 1910, and March 31, 1916, her children Mary I. Kadrie, Evelina Kadrie, Amit K. Kadrie, and Bertha Kadrie, were born in the Dominion of Canada; between March 31, 1918, and January 5, 1925, her children Mailivan E. Kadrie, Marie Kadrie, Dorothy Kadrie, and Elmer Kadrie, were born in International Falls, Minnesota; while her youngest child, Omar Kadrie, was born on February 9, 1927,

at St. Paul, Minnesota. The exact dates of birth of these children are given at page 21 of the record.

After the births of Mary I. Kadrie, Evelina Kadrie, and Amit K. Kadrie their names were entered upon the pay rolls of the Office of Indian Affairs, and annuity payments from the interest of the trust fund were made on their account. (R. 4, 36.) Following the birth of Bertha Kadrie, application was made by her mother, Sarah Kadrie, for her enrollment with the White Earth Chippewa Indians. (R. 21.) Pursuant to an adverse report of the superintendent of the White Earth Indian School (R. 22), under date of August 2, 1916, the Commissioner of Indian Affairs denied the application because the mother, a three-eighths blood Chippewa Indian, had married a white man and voluntarily left her people, and her child had been born among the whites (R. 22). Subsequent to this ruling, and by an order of the office of Indian Affairs issued August 18, 1917, the names of Mary I. Kadrie, Evelina Kadrie, and Amit K. Kadrie were stricken from the pay rolls of that Bureau (R. 4–5), and payments of interest on their account were discontinued.

Thereafter Sarah Kadrie petitioned the Secretary of the Interior for a revocation of the order of August 18, 1917. (R. 5.) The questions raised by her petition were referred to the Solicitor of the Department for an opinion. On February 17, 1919, the Solicitor rendered an opinion in which

he found that the action of the Office of Indian Affairs striking the names of Mrs. Kadrie's three oldest children from the pay rolls and withholding annuities from them, and refusing enrollment to her then youngest child, was erroneous and should be corrected. (R. 33–37.)

In conformity with the Solicitor's opinion, the names of the children of Sarah Kadrie then living were restored and added to the pay rolls of the Office of Indian Affairs, and thereafter the names of Bertha, Mailivan E., Marie, Dorothy, Elmer, and Omar Kadrie, following their respective births, were placed upon the said rolls, and all of these nine children thereafter, and until 1927, received a share of the interest payments from the trust fund held in the United States Treasury. (R. 5–6.)

On January 8, 1927, a succeeding Solicitor of the Department of the Interior rendered an opinion in the case of Jane B. Andrews in which he expressly overruled the opinion of his predecessor of February 17, 1919, on the ground that tribal membership was necessary to entitle one claiming to be a Chippewa Indian to share in the funds derived from the sale of the tribal lands. (R. 26, 37–51.)

Following the Solicitor's opinion of January 8, 1927, Mrs. Kadrie was called upon to show cause why the names of her nine children should not be stricken from the pay rolls of the Office of Indian Affairs. (R. 26.) After answer duly made, and due consideration thereof, the then Secretary of the

Interior, under date of October 1, 1927, directed that the names of the nine children be stricken from the pay rolls of the Office of Indian Affairs, which accordingly was done. (R. 26–27.)

The petition for mandamus (filed October 17, 1927) contained the express statement (R. 6):

> all of relators have at all times since their respective births received their per capita shares of all money payments made from said trust funds * * *.

The prayer of the petition was (R. 8):

> 1. That a rule issue directed to Hubert Work, Secretary of the Interior, directing him to show cause, on a day certain to be therein named, if any he may have, why a writ of mandamus should not issue commanding him to restore or cause to be restored the names of each of the relators on the supplemental rolls of the Chippewa Indians of Minnesota and to pay them their per capita shares in all future money payments that may be made under the authority contained in section 7 of said agreements approved March 4, 1890.

Answer was filed by the Secretary of the Interior (R. 9–13), and the case was heard upon its merits. The trial justice rendered a judgment, designated as a decree, in favor of the Secretary. (R. 14.)

On appeal, the Court of Appeals of the District of Columbia reversed the judgment of the lower court. (R. 58.)

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals of the District of Columbia erred:

1. In reversing the judgment of the court below which dismissed the relators' petition for mandamus.

2. In holding that because the relators were issue of a Chippewa Indian in the State of Minnesota, who was duly enrolled as such in the census provided for in the Act of January 14, 1889, they themselves were Chippewa Indians in the State of Minnesota and entitled to share in the annual payments of interest derived from the tribal trust fund.

3. In confusing the issue of Chippewa Indians in the State of Minnesota with such Indians themselves, and in holding accordingly that the relators were entitled to share in the annual payments of interest derived from the tribal trust fund.

4. In considering questions of genealogy respecting the issue of Chippewa Indians in the State of Minnesota, which will not arise for determination until the expiration of the 50-year trust period fixed by the Act of January 14, 1889, and upon final distribution of the tribal trust fund, and in making such questions the basis for a determination that the relators have a present right to share in the annual payments of interest which are derived from the tribal trust fund.

5. In attempting by mandamus to control the Secretary of the Interior in the exercise of his authority to place a reasonable construction upon an Act of Congress relating to matters committed to the jurisdiction of his Department by Congress, and in thereby preventing him from acting in accordance with such construction.

SUMMARY OF ARGUMENT

The trust fund created by Section 7 of the Act of January 14, 1889, now on deposit in the Treasury of the United States to the credit of the Chippewa Indians in the State of Minnesota, being derived from the proceeds of the sale of tribal lands of *said Indians,* must be regarded as tribal property belonging to said Indians, not as individuals, but as members of the Chippewa Tribe of Indians in the State of Minnesota, until the purposes of the trust have been fully accomplished. The distribution of the income must be made in accordance with the general rule governing participation in tribal property, unless a different rule has been provided by Congress either in the Act of 1889 or in other existing legislation.

The right to share in the annual income from the trust fund belonging to the Chippewa Indians is, by Section 7 of the Act of 1889, confined to persons who are Chippewa Indians, within the meaning of that Act, while the distribution of the fund itself is to be made at the end of fifty years not only to such Indians but also to the "issue then

living" of such Indians. The right to share in the income from the trust fund and the right to share in the principal upon distribution depend upon different language. The Court of Appeals evidently failed to notice this distinction and found that because the appellants, respondents herein, were the issue of a Chippewa Indian they were entitled to "the privilege of [the] act," and therefore entitled to share in the annual income as well as in the ultimate distribution of the principal of the Chippewa trust fund. There was no finding by the Court of Appeals that the respondents themselves actually were Chippewa Indians.

The relators in this case are not "Chippewa Indians" in a political or racial sense, or in the sense in which those words are used in the Act of 1889. Consequently they are not entitled to share in interest payments, as Section 7 of that Act expressly limits the right to share in such payments to persons who are "Chippewa Indians." Nor can they be held at this time to be entitled to share in the final distribution of the principal of said fund at the end of the fifty-year trust period, as the right to participation in such distribution is expressly limited by that section to the Chippewa Indians and their issue *then* living. There is no other Act of Congress changing the general rule as to the right to share in tribal property which is in any way applicable to respondents in this case.

After the Act of January 14, 1889, became effective it was necessary for the Secretary of the

Interior to construe the terms "Chippewa Indians" in order that he might determine who were entitled to receive interest payments under Section 7 of the Act of 1889. He construed these words as not including the children of a white father, who were born outside of the tribal relation. As this construction is reasonable and neither arbitrary nor capricious, it is entitled to great weight.

ARGUMENT

I

THE CHIPPEWA TRUST FUND CREATED BY SECTION 7 OF THE ACT OF JANUARY 14, 1889, INCLUDING THE INTEREST ACCRUING THEREON, MUST BE REGARDED AS TRIBAL PROPERTY AND THEREFORE SUBJECT TO THE GENERAL RULE GOVERNING PARTICIPATION IN SUCH KIND OF PROPERTY, EXCEPT AS SUCH GENERAL RULE HAS BEEN CHANGED BY THAT ACT OR BY OTHER EXISTING LEGISLATION

The Act of January 14, 1889, 25 Stat. 642, provided a plan for the relief and civilization of the Chippewa Indians in the State of Minnesota, whereby the title of said Indians to their lands on the various reservations theretofore occupied by them in that State was to be extinguished by means of a cession to the United States. The Indians were to be removed to and allotted on the White Earth and Red Lake Reservations when located thereon, and the ceded lands not otherwise required for such allotments or other purposes designated in the Act were to be sold, and with the net proceeds from the sale a permanent fund drawing interest at the rate

of five per centum per annum was to be created and placed in the Treasury of the United States to the credit of all of these Indians for a period of fifty years after the allotments were made.

This Chippewa trust fund, including interest accruing thereon, being derived from the sale of the tribal lands of said Chippewa Indians, must be regarded as tribal property belonging to all of said Indians, not as individuals but as members of the Chippewa Indian Tribe.

The Court of Appeals of the District of Columbia in *Morrison* v. *Fall,* 290 Fed. 306, which was a suit against the Secretary of the Interior and others by a person describing himself as a member of that class of persons called " all the Chippewa Indians in the State of Minnesota," decided that the funds arising under Section 7 of the Act are held by the United States in trust for the Chippewa Indians as a tribe and not in trust for Indians possessing Chippewa blood as individuals. And this Court, in *Morrison* v. *Work,* 266 U. S. 481, affirmed the judgment of the Court of Appeals, although it did not find it necessary to pass upon the question whether the rights of Indians in the funds were tribal or individual property. On page 485 this Court said:

> It is admitted that, as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote

> their welfare. The United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession. Morrison's contention is that, by virtue of the Act of 1889 and the agreements made thereunder, the ceded lands ceased to be tribal property and the rights of the Indians in the lands and in the fund to be formed became fixed as individual property. The Court of Appeals held this contention to be unfounded. We have no occasion to determine whether it erred in so ruling. The claim of the United States is, at least, a substantial one.

The general rule as to participation in tribal property was tersely stated by the Circuit Court of Appeals for the Eighth Circuit in *Oakes* v. *United States,* 172 Fed. 305, 307, which is a Chippewa case arising under this same Act of 1889, as follows:

> Originally, the test of the right of individual Indians to share in tribal lands, like the Chippewa Reservations in Minnesota, was existing membership in the tribe, *and this was true of all tribal property.* (Italics ours.)

The right to participate in the annual distributions of income, as well as in the final distribution of the fund itself at the end of the fifty-year trust period, must be tested by the general rule applying in the participation of tribal property, unless Congress has laid down a different rule in that Act or other existing legislation. Section 7 of

the Act of January 14, 1889, provides that during the trust period of fifty years one-half of the interest, except in cases otherwise provided, is to be paid annually in cash, in equal shares, to the heads of families, and guardians of orphan minors for their use, and one-fourth of the said interest, during the same period, and with like exceptions, is to be paid annually, in cash, in equal shares, per capita, to all other classes of *"said Indians."* The remaining one-fourth of the said interest during the said trust period of fifty years is to be devoted to the establishment and maintenance of free schools among *"said Indians."* As to the distribution of the trust fund itself, the provision of Section 7 is that "at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue *then living,* in cash, in equal shares." (Italics ours.)

Clearly these provisions contemplate no change in the general rule in so far, at least, as the annual distributions of income are concerned, and as to the final distribution of the permanent fund at the expiration of the fifty-year trust period the provision changes the rule only to the extent that it authorizes participation in said fund by "all of said Chippewa Indians and *their issue then living.*"

We submit that it was error to hold, merely because the Act of January 14, 1889, was in the nature of an agreement with the various bands or tribes of Chippewa Indians then occupying several reservations widely scattered throughout the State of

Minnesota, that the original tribal relations of the Indians were dissolved upon the ratification of that agreement and that the trust fund created with the proceeds of the sale of the former lands of the tribes became individual property belonging to the Indians formerly composing the said tribes and their issue. This holding ignores the purpose and policy of the Act to provide for the relief and civilization of the Chippewa Indians in their tribal capacity and misconstrues Section 7 of that Act. Nowhere in the Act of 1889 is any provision to be found indicating that Congress intended to effect a premature dissolution of the tribal relations of the Chippewa Indians. While it may be argued with force, perhaps, that the policy of the Act probably was to bring about ultimately the actual breaking up and complete dissolution of tribal relations by a gradual process resulting from the stimulus of individual acquisitiveness, yet the Act indicates no purpose to change the character of the property involved until it actually comes into the hands of each individual Indian discharged from the trust.

There is no Federal statute changing the general rule, which has application to the facts in this case. The existing Acts of Congress having relation to the subject are general statutes applicable to particular circumstances arising in Indian relations which do not arise in the present case. Those Acts do not change the rule, but relax or broaden its application in special cases in order to preserve to certain classes of Indians their rights

in tribal property which they would otherwise lose by reason of a strict application of the rule. Thus, for instance, the Act of August 9, 1888, c. 818, Sec. 2, 25 Stat. 392, declares that a tribal woman thereafter marrying a citizen of the United States shall become a citizen of the United States without impairing or in any way affecting her rights to any tribal property or any interest therein; and the Act of June 7, 1897, c. 3, Sec. 1, 30 Stat. 62, 90, declares that the children born of a marriage theretofore solemnized between a white man and an Indian woman by blood, and not by adoption, where said Indian woman was at that time, or at the time of her death, recognized by the tribe, shall have the same rights and privileges to the property of the tribe to which the mother belongs or belonged at the time of her death, by blood, as any other member of the tribe. By reason of the latter Act Sarah Kadrie, as the daughter of Mary Blair, whose marriage was solemnized prior to 1897 while a recognized member of the Chippewa Tribe, was enrolled on the rolls of the Chippewa Indians in Minnesota and has at all times ever since received a *per capita* share in all money payments thereafter made under the Act of January 14, 1889.

II

THE COURT OF APPEALS EVIDENTLY BASED ITS DECISION UPON A PROVISION OF THE STATUTE WHICH APPLIES ONLY TO THE FINAL DISTRIBUTION OF THE FUND

Section 7 of the Act of January 14, 1889, contains two distinct provisions relative to the proceeds

of the sale of the tribal lands of the Chippewa Indians in the State of Minnesota, now held as a trust fund in the Treasury of the United States. One of those provisions relates to the disposition of the income derived from the fund while it is held in trust. The other provision relates to the disposition of the fund itself at the expiration of the fifty-year period fixed by the statute.

With respect to the income, it is provided that one-half shall be paid annually to the heads of families and the guardians of orphan minors for their use, one-fourth in equal shares *per capita* to all other classes of the "said Indians," and that the balance be used for the purposes of Indian schools. In order, therefore, for any person to share in the income derived from the trust fund, he must show that he belongs to some of the groups or classes of Chippewa Indians in the State of Minnesota, as contemplated by the Act.

With respect to the final disposition of the fund at the expiration of the fifty-year trust period, the provisions of the Act are much broader—the "permanent fund shall be divided and paid to all of said Chippewa Indians and *their issue then living,* in cash, in equal shares." The distinction is obvious. During the fifty-year trust period the fund derived from the sale of the tribal lands evidently is intended to serve the same purpose which the lands themselves would have served had they remained in the possession of the tribe; that is to say, the Chippewa Indians, considered in a tribal

sense, are to be maintained and supported by the increment of a fund which, from the standpoint of equity, still may be considered as the land which once supported them and their ancestors. When the fund finally is released from the trust at the expiration of the fifty-year trust period, a different situation arises, and a different provision for its disposition is made by the statute. It is not until then that the *"issue then living"* of the tribal Chippewa Indians are entitled to any interest in the fund.

We submit that the failure to recognize this distinction led the Court of Appeals of the District of Columbia into error. The court said in the final paragraph of its opinion (R. 58):

> We think a reasonable interpretation of the intent of Congress justifies the extension of the privilege of this act to the lineal descendants of the Chippewa Indians, recognized as such at the time of the passage of the act of 1889, and owing to the limited period within which distribution is to be made, this does not amount to an unreasonable extension of the privilege. At the end of the fifty-year period very few of the Indians living in Minnesota in 1889 will be living to avail themselves of the distribution privileges; and, if the act is confined to their direct "issue," the number available to take would be very limited. It is, therefore, doubtful, whether the extension of this act to the lineal issue will produce a much

> greater number to avail themselves of the final distribution than the number that were living in 1889. We think the expression "and their issue then living" included all of the issue and, therefore, should be extended to the relators.

The court apparently confused the "privilege" of the Act to share in the ultimate distribution of the trust fund at the expiration of the fifty-year trust period with the "privilege" to share in the annual distributions of income from the trust fund, and determined that because the children of Sarah Kadrie might be entitled to share in the ultimate distribution of the fund as the issue of a Chippewa Indian, they were by reason of that fact also entitled to share in the annual income payments.

We contend that the relators could share in the distribution of income only if they were Chippewa Indians within the meaning of the Act of January 14, 1889, and the Court of Appeals nowhere found that the relators were such Indians.

The right of the relators to share in the ultimate distribution of the trust fund as the issue of a Chippewa Indian was not a question before the court, and it should not have been considered, although it apparently was within the scope of the relators' prayer for relief. The existence of that right was a question which could not be tried by mandamus and determined years in advance of the time when the distribution would take place.

III

THE RESPONDENTS IN THIS CASE ARE NOT "CHIPPEWA INDIANS" IN A POLITICAL OR RACIAL SENSE, OR IN THE SENSE IN WHICH THOSE WORDS ARE USED IN THE ACT OF 1889, AND CONSEQUENTLY THEY ARE NOT ENTITLED TO SHARE IN THE ANNUAL INCOME

The relators are of thirteen-sixteenths white blood and are of only three-sixteenths Indian blood (R. 22), and consequently would be considered as white persons under the majority of State statutes having reference to race. Politically they probably should be considered as Syrians, as their father, a native of Syria, apparently lived outside of the United States after his naturalization for a sufficient length of time to raise a presumption of the forfeiture of his American citizenship. (R. 4, 5.) If they are not Syrians, they are citizens of the United States, but in no political sense are they Indians.

Nor are they to be regarded as "Chippewa Indians" within the meaning of the Act of 1889. Bearing in mind that the agreements contemplated by that Act were made with the Chippewa Indians of Minnesota in their tribal capacity and not merely as individuals, we submit that since there is nothing in said Act warranting a contrary conclusion, the words "Chippewa Indians in the State of Minnesota," as used in the Act of 1889, must be interpreted and construed as meaning Chippewa Indians who maintain their tribal relations in that State. That the relators possess a given quantum of Chip-

pewa Indian blood is not sufficient to bring them within that description. They were the children of a white father and a part Indian-blood mother, who had permanently severed her tribal relations, and they have always lived among white people, removed from tribal associations. They are not members of the tribe to which their mother once belonged, nor are they members of any other tribe. Consequently, even if they were regarded as "Chippewa Indians" in a racial sense, there would be no justification for regarding them as included within the meaning of those words as used in the Act of 1889.

That only tribal Indians are to participate in the annual distributions of the income from the Chippewa trust fund results from the character of the fund, which has been discussed under Point I, *supra.*

The Court of Appeals, in reversing the decision of the trial court in the instant case, declared, in effect, that the decision in the *Oakes case, supra,* merely covers the right to an allotment and not the right to participate in the trust fund or the interest accruing thereon; that the provisions of the Statute must be read in connection with the policy Congress had established at that time in relation to the Indians. It is submitted, however, that the court in the *Oakes Case* distinctly makes reference to the rule as applying to *all* tribal property. As to the policy of Congress referred to by the Court of Appeals, we submit that the Acts cited by it (Acts of

March 3, 1875, c. 132, 18 Stat. 420; February 8, 1887, c. 119, 24 Stat. 388; and August 9, 1888, c. 818, 25 Stat. 392), do not justify the conclusion in effect arrived at by that court in this case that the general rule governing tribal rights of property is to be disregarded.

Congress no doubt has by several statutes preserved to certain classes of Indians the right to share in the tribal property after they have severed or abandoned their tribal relations. Examples of these statutes are not only the Acts cited by the Court of Appeals, but also the Acts of March 3, 1865, c. 127, Sec. 4, 13 Stat. 541, 562; and June 7, 1897, c. 3, Sec. 1, 30 Stat. 62, 90.

The purpose and policy of all of these Acts, as shown by the opinion in the *Oakes Case, supra,* is merely to relax or broaden that general rule so as to preserve to the Indians referred to in such Acts rights that they might have had in the property of the tribe to which they formerly belonged and which rights they would otherwise have lost but for the provisions of such statutes. Although the Court of Appeals was right in assuming that the purpose of Congress was to encourage the Indians to abandon their tribal relations and adopt the habits and customs of civilized life, the Act of 1889 does not contain any provisions dissolving their tribal relations or doing away with the general rule. The provisions of Section 7 do not warrant the conclusion that the relators, who have only

three-sixteenths of Chippewa Indian blood, who were born outside the reservations, and who never affiliated with the Indians belonging thereto or maintained tribal relations with them, are entitled to share in the annual distributions of the interest from the Chippewa trust fund. Nor can the infant relators be regarded as within the saving provisions of any of the Acts mentioned above. They are in the same situation as Mrs. Andrews and Mrs. Bent in the *Oakes Case,* who never were members of the tribe and whom the court held not entitled to any share in the distribution of the tribal property.

The facts in the recent case of *Pape* v. *United States,* 19 F. (2d) 219—involving the application of the Act of June 7, 1897, *supra,* which is one of the Acts relaxing or broadening the general rule, as referred to above—in which this Court denied a petition for certiorari, 275 U. S. 532, were much like those in the instant case. The court said (p. 220):

> We find no authority to sustain the construction that, when an Indian woman married a white man after the act of 1897, and thereafter abandoned her tribal relations and adopted the customs and habits of civilized life, children born to her after such abandonment, who have never been recognized as members of the tribe to which the mother belonged, have the same rights as the mother would have had if she had been affiliated with the tribe at the time of her marriage.

It has been argued on behalf of the relators that the tribal relations of the Chippewa Indians in the State of Minnesota have ceased to exist, and that therefore it is impossible to make tribal affiliations a test in determining the right of one descended from a Chippewa ancestor to share in the distributions of interest from the tribal trust fund. But since the passage of the Act of January 14, 1889, Congress has recognized the continued existence of the Chippewa Tribe in a number of Appropriation Acts and in other legislation. The Act of March 4, 1929, c. 705, 45 Stat. 1562, 1584, is the most recent example in point.

IV

THE CONSTRUCTION OF THE ACT BY THE SECRETARY OF THE INTERIOR AS EXCLUDING PERSONS LIKE THE RESPONDENTS IS ENTITLED TO GREAT WEIGHT

Before the Office of Indian Affairs, under the supervision of the Secretary of the Interior, could make payments of the interest accruing annually upon the tribal trust fund of the Chippewa Indians in Minnesota, it was necessary for the Secretary to determine what persons, as a class, were entitled to receive such payments.

The Act stated that the interest payments were to be made to "Chippewa Indians." It, therefore, became necessary for the Secretary to determine who were "Chippewa Indians." After careful consideration, and upon advice from the Solicitor of his Department, the Secretary determined that

the children of a white father who were born outside of any tribal relation, as were the relators, were not "Chippewa Indians" within the meaning of the statute, even though they were the issue of a Chippewa Indian ancestor. This conclusion was reached after the mother and natural guardian of the relators had been heard in their behalf. It was neither capricious nor arbitrary, but was a reasonable construction of the statute which was justified and made possible by the express language of the statute itself.

The census of the Chippewa Indians in Minnesota provided for by the Act of January 14, 1889, was extended by Congress to become the basis for the distribution not of allotments alone, but of money and other property belonging to the Chippewa Indians in Minnesota. Congress was dealing entirely with tribes and tribal Indians, and it made the Secretary of the Interior the administrator of their property, and confided that trust to the exercise of his official judgment and discretion. His construction of the Act while not conclusive, "is entitled to great respect and ought not to be overruled without cogent and persuasive reasons." *La Roque* v. *United States,* 239 U. S. 62, 64.

This Court said in the case of *Hall* v. *Payne,* 254 U. S. 343, 347–348:

> It is manifest from this statement that the petition presents a controversy over the true construction of the Act of 1894. From the act, and the Secretary's decision, it is ap-

parent that the latter was not arbitrary or capricious, but rested on a possible construction of the act, and one that the reported decisions of the Land Department show is being applied in other cases. The direction of the act that the lands be reserved "from any *adverse* appropriation" means necessarily an appropriation adverse to the State and this gives color to the Secretary's view. He could not administer or apply the act without construing it, and its construction involved the exercise of judgment and discretion. The view for which the relator contends was not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to it. The relator, therefore, is not entitled to a writ of mandamus.

The same principle was recognized in *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *Ness* v. *Fisher,* 223 U. S. 683, and in other cases decided by this Court.

It is true that for a short time a different construction, favorable to the relators, was placed upon the statute in conformity with the views of a former Solicitor. That fact, however, involves no element of estoppel, as no action was taken to the prejudice of the relators in reliance upon it. As they thereby were enabled to obtain money which they can not be required to repay, they certainly have no cause for complaint.

CONCLUSION

In view of the above it is submitted that the judgment of the Court of Appeals of the District of Columbia should be reversed.

Respectfully submitted.

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No. 77

In the Supreme Court of the United States

OCTOBER TERM, 1929

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, PETITIONER

v.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, AMIT K. KADRIE, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

MEMORANDUM OF ADDITIONAL AUTHORITIES ON BEHALF OF PETITIONER

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MEMORANDUM OF ADDITIONAL AUTHORITIES ON BEHALF OF PETITIONER

This memorandum is filed upon the suggestion of the Court for the purpose of presenting to the Court certain citations and authorities not contained in the Government's brief in chief.

I

On the question of the attitude of Congress with respect to the Chippewa Indians in Minnesota, see:

38 Stat. 88, 592.
39 Stat. 135, 979.
40 Stat. 572.

41 Stat. 14, 419.
42 Stat. 221.
43 Stat. 798.
Johnson v. *Gearlds*, 234 U. S. 422.

As to the effect of executive determination of the existence of the Tribe, see *United States* v. *Holliday*, 3 Wall. 407, 418.

II

As to the contention of respondent that only Indians in being at the time of the passage of the Act of January 14, 1889, were entitled to allotments, which was apparently the basis for the interpretation advanced by the Court of Appeals of the District of Columbia with respect to the case of *United States* v. *Oakes*, see:

Fairbanks v. *United States*, 223 U. S. 215.
Woodbury v. *United States*, 170 Fed. 302.

III

As to the legal effect to be given the census rolls provided for in Section 1 of the Act of January 14, 1889, see *United States* v. *La Roque*, 239 U. S. 62.

IV

As to the question of the right of an executive head to overrule prior executive action, see:

West v. *Standard Oil Company*, 278 U. S. 200.
Greenameyer v. *Coate*, 212 U. S. 434.
Potter v. *Hall*, 189 U. S. 292.
Beley v. *Naphtaly*, 169 U. S. 353, 364.

Knight v. *U. S. Land Association*, 142 U. S. 161, 178, 181, 182.

Pearson v. *Williams*, 202 U. S. 281.

United States ex rel. Lowe v. *Ballinger*, 35 App. D. C. 524.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 177

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, PETITIONER,

vs.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, AMIT K. KADRIE, BERTHA KADRIE, MAILIVAN E. KADRIE, MARIE KADRIE, DOROTHY KADRIE, ELMER KADRIE, AND OMAR KADRIE, BY THEIR NEXT FRIEND, MOTHER, AND NATURAL GUARDIAN, SARAH KADRIE, RESPONDENTS.

RESPONDENTS' OBJECTIONS TO THE GRANTING OF THE WRIT OF CERTIORARI.

WEBSTER BALLINGER,
Attorney for Respondents.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. 877

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR, PETITIONER,

v.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, AMIT K. KADRIE, BERTHA KADRIE, MAILIVAN E. KADRIE, MARIE KADRIE, DOROTHY KADRIE, ELMER KADRIE, AND OMAR KADRIE, BY THEIR NEXT FRIEND, MOTHER, AND NATURAL GUARDIAN, SARAH KADRIE, RESPONDENTS.

RESPONDENTS' OBJECTIONS TO THE GRANTING OF THE WRIT OF CERTIORARI.

The petiton for certiorari (pp. 11-12) states no sufficient grounds to justify this Court in granting the writ. No other judgment could have properly been entered by the court below on the record before it.

The questions which petitioner seeks to have this Court review all relate to the construction of a pro-

vision of an agreement governing the distribution of a trust fund created for the Chippewa Indians in the State of Minnesota and their *issue*. The decision and judgment of the court below affirmed a construction of said provision adopted by the officers and agents of the Department immediately following the execution and approval of said agreement on March 4, 1890, uniformly followed thereafter with the acquiescence and approval of the Indians for thirty-seven years, or until January 8, 1927, and under which the greater portion of the trust fund was distributed.

The learned opinion of the Court of Appeals (R. 72-7) recites only such facts as the Court deemed necessary for the purposes of decision. A statement of the facts disclosed by the record will greatly aid in disposing of petitioner's Specifications of Error (R. 10-11) and Reasons for Granting the Writ (R. 11-12).

Statement.

Prior to January 14, 1889, there were eleven bands or tribes of Chippewa Indians occupying ten separate, widely scattered reservations in the State of Minnesota (H. R. Ex. Doc. 247, 51st Cong., 1st Session; R. 29). By the Act of January 14, 1889 (25 Stat. at L. 642; R. 25-28) the United States submitted a proposal to all the different bands or tribes of Chippewa Indians in the State of Minnesota for the dissolution of their tribal governments and the division of their then tribal property among the *then members of said tribes or bands and their issue*. The Act authorized the President of the United States, through a commis-

sion, to enter into negotiations with all of said bands or tribes, and to conclude agreements with them upon certain express terms therein set out, which terms contained detailed instructions with perfect limitations for the disposition of every acre of the then existing tribal or band reservation lands and timber, and of every dollar of the net proceeds to be received therefrom. The plan submitted in the proposal provided—

(*a*) For the preparation by the Commission of "*an accurate census of each band or tribe,*" in order to determine whether the proper number of Indians gave their assent to the proposed plan, "and for the purpose of making the *allotments* and money payments" set out in the proposal, said census to be made while the commission was engaged in negotiating the agreements, and was to be completed before the agreements were executed (Section 1, R., 26).

(*b*) For the setting aside for allotment purposes of sufficient land on the White Earth Reservation to allot all of the then members of the different bands or tribes as shown by said census rolls, except those residing on or belonging to the Red Lake Reservation, and the setting aside on the Red Lake Reservation for allotment purposes of sufficient land to allot the then members of the Red Lake Band as shown by the census of that band (Section 1, R., 26).

(*c*) For the cession to the United States, in trust, of all lands of said Indians embraced in all existing reservations, except the lands set aside and reserved for allotment purposes on the White Earth and Red Lake Reservations (Section 1, R., 26).

(*d*) For the allotment in severalty of land to each member of the Red Lake Band as shown by said census rolls out of the lands reserved for allotment purposes on the Red Lake Reservation; all the members of all the other different bands or tribes as shown by said census rolls were to be removed to the White Earth Reservation, where they were required to take up their residence, and after having done so, were to be allotted lands in severalty out of the lands reserved for allotment purposes on that reservation.

(*e*) Any Indian residing on any of the ceded reservations was to be permitted to take his allotment in severalty out of the ceded lands on the reservation where he lived at the time the other Indians were removed to the White Earth Reservation (Section 3, R. 27). The Indians who had received allotments on any of the reservations were not to be deprived thereof or disturbed therein, except with their individual consent (Section 1, R. 26).

(*f*) The ceded lands were to be classified, appraised and sold (R., 27), and the net proceeds received therefrom were to be deposited in the Treasury of the United States "*to the credit of all the Chippewa Indians in the State of Minnesota*" as a permanent fund, which should draw interest at the rate of 5 per cent per annum, payable annually for the period of fifty years. One-half of the interest annually accruing on the principal fund was to be paid annually in cash, in equal shares "to the heads of families and guardians of orphan minors for their use," and one-fourth was to be paid annually "in

> cash, in equal shares per capita to all other classes," and at the expiration of the fifty-year trust period, the permanent fund was to be divided and *"paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."* (Section 7, R., 28.)

The report of the House Committee on Indian Affairs on the bill that became the said Act of January 14, 1889, contained the following statement of the intent and purpose of said legislation:

> "The bill is in the nature of a proposal to the Indians, and if not accepted by them is inoperative, and nugatory. If accepted and assented to by at least two-thirds of the male adults of each band, the bill, as passed, becomes effective. *In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens,* * * *" (R., 28).

Agreements were entered into with all of the tribes or bands embodying the plan set out in the Act of January 14, 1889, said act being incorporated in each agreement either in its entirety or by reference. They were executed by two-thirds of the male adult members of each band or tribe as shown by the census rolls, on behalf of the Indian tribes or bands, by the commissioners representing the United States, as required by said act, and on March 4, 1890, approved by the President of the United States, and as expressly declared in said Act of January 14, 1889, thereupon "took effect" (R., 29).

Following the execution and approval of said agreements, all of the members of the various tribes or

bands, exclusive of the Red Lake Band, were either removed to the land set aside for allotment purposes on the former White Earth Reservation, where they established their residence, and were there allotted land, or were permitted to take their allotments out of the ceded lands which were part of the former reservations upon which they resided (R., 29). By the Act of June 21, 1906, all restrictions were removed from allotments made out of the lands reserved for allotment purposes on the former White Earth Reservation then and thereafter held by adult mixed-blood Indians (R., 29-30). Since March 4, 1890, there have been *no band or tribal governments, chiefs, or councils, and no Indian reservation in Minnesota,* except the Red Lake Reservation created under the Act of February 20, 1904 (R. 42-44.)

Immediately following the approval of the agreements, and as a basis for the distribution of the interest annually accruing on the principal fund and the ultimate division of the principal fund under Section 7 of said agreements, the officers and agents of the Department, before each annual payment was made, revised the original rolls made by the Commission under the Act of January 14, 1889, by striking therefrom the names of all persons appearing thereon who had died since the preceding annual payment was made, and adding thereto the names of all children born since the last annual payment was made to parents whose names appeared on said rolls, irrespective of where the child was born. In adding the names of the newborn children, proof was only required that the new-

born child was a child of an enrolled parent. No inquiry was made as to the place of birth of the child (R., 39-44).

Immediately following the approval of the agreements, the Department construed the language appearing in Section 7 of said Act of January 14, 1889, as embodied in the agreements, viz:

> "One-half of said interest shall, during the said period of fifty years, except in cases hereinafter or otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use,"

as authorizing a payment *per capita* and not *per stirpes*. In 1896 a question was raised as to whether the one-half of the interest money should be paid *per stirpes* and not *per capita*. October 15, 1896, the question was referred to the Comptroller of the Treasury Department, who, under date of October 21, 1896 (3 Comp. Dec., 158) held in part as follows:

> "The question now raised particularly relates to the provision that one-half of the interest shall be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use, and one-fourth of said interest shall be annually paid in cash in equal shares *per capita* to all other classes. * * *
>
> "In reference to this clause the commission who negotiated this treaty said:
>
> " 'The clause of the act of January 14, 1889, providing for the payment of the interest that may accrue on the permanent fund, was to us

obscure, inasmuch as it says "one-half of said interest shall be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use, and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares *per capita* to all other classes of Indians," etc., and as we could neither explain this to the Indians or comprehend it so as to give it such an interpretation as would do equal justice, we promised the cash payment should be made *per capita* in equal shares.' (House Ex. Doc. No. 247, p. 24, Fifty-first Congress, first session.)

"With their statement as to the obscurity of this legislation, I fully agree, and inasmuch as this practice of making equal *per capita* payments has been uniformly followed since the passage of this act, I do not feel justified in making any other construction than that given contemporaneously with the inauguration of the enforcement of the act. Unless it is clearly erroneous, a long continued, uniform construction of an act substantially contemporaneous with its enactment, is sufficient ground to regard the question as settled, under the well-established doctrine that in cases of doubt the executive practice will be treated as the true construction of the act." * * *

No payments from the principal fund or interest arising thereon have ever been made *per stirpes*, but all have been made *per capita* to persons whose names appeared upon the money-payment roll (R., 38).

Mary Blair, grandmother of respondents, a recognized and enrolled member of the White Earth Band of Chippewa Indians, established her residence upon and was allotted land out of the lands reserved for allotment purposes on the former White Earth Reservation.

In the year 1892 there was born to Mary Blair at Richwood, Minnesota, in lawful wedlock, a child, Sarah Cogger, now Sarah Kadrie. Following her birth, she was enrolled, and her name has ever since remained on said rolls and she has at all times subsequent thereto received a per capita share of all money payments thereafter made (R., 29).

Following the approval of said agreements, on March 4, 1890, and until January 8, 1927, the *uniform practice* was to enroll all children and grandchildren of those persons who were members of the various bands or tribes, and whose names were inscribed on the census rolls prepared by the Commission under Section 1 of said Act of January 14, 1889. *That the new-born child was the issue of an enrolled ancestor was the only requirement to enrollment for money payments under Section 7 of said Act and agreements* (R., 39, 40, 41, 42, 43, 44).

In 1909, Sarah Cogger married Mall Kadrie, a naturalized citizen of the United States, as a result of which union there were born to Sarah Kadrie, in lawful wedlock, the following children, on the following dates and at the following places (R., 30):

Name.	Date.	Place of birth.
Mary I. Kadrie	1/10/10	Canada
Evelina "	5/11/11	"
Amit K. "	3/30/14	"
Bertha "	3/31/16	"
Mailivan E. "	3/31/18	International Falls, Minn.
Marie "	9/ 9/20	" " "
Dorothy "	8/29/22	" " "
Elmer "	1/ 5/25	" " "
Omar "	2/ 9/27	St. Paul, Minn.

Following the births of the first three children, their names were inscribed upon the money-payment rolls by the officers and agents of the United States (R., 30), in conformity with the established practice (R., 39-44).

Following the birth of Bertha, the fourth child of Sarah Kadrie, application was made for her enrollment at the White Earth Agency. The application was transmitted to the Commissioner of Indian Affairs July 11, 1916 (R., 30). July 20, 1916, the application was returned to the Superintendent for investigation (R., 31). July 28, 1928, the Superintendent reported that Bertha was a child of Sarah Kadrie, who was of three-eighths Indian blood; that the mother, Sarah Kadrie, married a white man, and "left the reservation several years ago"; that the child was born in Winnipeg, Manitoba, Canada, "among the white people"; that Sarah Kadrie was the same person who made a claim for back annuities due Evelina, her second child, which was disallowed June 24, 1916, for the reason that the child was born of a white father, away from the White Earth Reservation, and that the parents had not lived among or affiliated with the Indians of said reservation since its birth. The Superintendent

recommended the disallowance of the application under paragraph 324 of the regulations issued under the Act of June 7, 1897 (30 Stat., 90, R., 31). August 2, 1916, the Indian Office approved the recommendations of the Superintendent (R., 32).

At about the same time the above action was taken in the case of Bertha, and in the year 1916, the Superintendent located at White Earth, and in charge of the money-payment rolls, recommended to the Indian Bureau that the names of a number of children and grandchildren of originally enrolled and allotted parents and grandparents whose names had been inscribed on the money-payment rolls be stricken therefrom on the stated ground that under said regulations issued under said Act of June 7, 1897, and the opinion of the Circuit Court of Appeals in the case entitled Oakes *v.* United States (172 U. S., 305), they were not entitled to have their names on said rolls and to receive distributive shares of the money payments from the trust estate as they had not been born to membership in the tribe, had not affiliated with, and had not been recognized by the tribe as members thereof. The Indian Bureau concurred in the recommendations of the Superintendent, and directed that the names of said children be stricken from the money-payment rolls, which orders were carried into effect (R., 34).

Sarah Kadrie, mother, natural guardian, and next friend of Mary I., Evelina and Amit K. Kadrie, petitioned the Secretary of the Interior for a revocation of the order of the Indian Bureau under which the names of her minor children had been stricken from said money-payment rolls (R., 34, 35). Similar peti-

tions were filed by the Indian parents or ancestors of the other children whose names had been stricken from said rolls by like orders of the Indian Bureau. The question presented for decision by each of the separate petitions being identical or substantially identical, the petition filed by Sarah Kadrie on behalf of her minor children was selected as a test case, and was referred to the then Solicitor for the Department for an opinion determinative of the rights of all (R., 35). On February 17, 1919, the Solicitor rendered an opinion (R., 46-51) reversing the action taken by the Indian Bureau in all the cases and directing the restoration to the rolls of the names of respondents and all other Indian children of like status. As to the rights of respondents, the Solicitor (R., 50, 51) held:

> "In the particular case giving rise to a call for this opinion, Sarah Kadrie, née Cogger, was a full-blood Chippewa Indian woman born on the reservation in the year 1892—subsequent to the cession and the original enrollment. She was an only child of her mother, a member of the original enrollment. As such, she is entitled to participate for herself in the annuities; and that right is accorded to her. She married, in 1909, Mall Kadrie, a native of Syria, and since then has resided with him mainly in Canada, but for a short time in Syria—and at no time on the reservation, although occasionally visiting it. There have been born of said marriage four children, the oldest now about nine years of age. Her three oldest children were for some years enrolled among the Chippewa Indians, and she was paid annuities for them, until the year 1917, when, by direction of the Indian Bureau, their names were stricken from

the roll and their annuities withheld. At the same time, the enrollment of the youngest child was refused.

"In my opinion, this action was erroneous, and should be corrected. Sarah Kadrie and her children are 'issue' of her mother, a full-blood Chippewa Indian duly enrolled, and as such they will be entitled, at the expiration of the trust period, to share in the distribution of the trust fund; and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited either by acquiring foreign citizenship or by abandoning, or failing to acquire. residence on the Indian reservation or with the tribe."

Thereupon the names of Mary I., Evelina and Amit K. Kadrie were restored to said rolls, and the names of the other six children of Sarah Kadrie were placed upon said rolls following their births, and all of them received their distributive shares of all money payments made prior to October 1, 1927 (R., 35), including one-fourth of the principal trust fund which was distributed under the Act of May 18, 1916 (39 Stat. at L., 123 at 135), and other distributions thereafter made of the principal fund from time to time prior to October 1, 1927.

The opinion of the Solicitor rendered February 17, 1919, was adhered to in all cases of enrollment of newborn children down to January 8, 1927. Between 1916 and 1919, during which period the names of many Indian children were stricken from the rolls by orders of the Indian Bureau, reversed by the Solicitor's opinion of February 17, 1919, and thereafter reinstated, payments had been made to the Chippewa Indians in

which said children, as well as other children born during said period and of like status, did not participate solely because their names had been stricken or omitted from the money-payment rolls. To enable the Secretary to pay said children the shares to which they were entitled under said opinion of February 17, 1919, Congress enacted the act approved April 14, 1924 (43 Stat., at L., 95; R., 35, 36). By this act, the Secretary was "authorized to pay, out of any moneys belonging to the Chippewa Indians of Minnesota, such amounts as he may find due any persons of Chippewa blood *whose names may have been erroneously omitted or stricken from the Chippewa annuity rolls, or who may have been* or may hereafter be *found entitled to enrollment for annuity payments authorized by Section 7 of the Act of Congress approved January* 14, 1889" (R., 35). Under the authority contained in said act, all Indian children who were either refused enrollment, or whose names were stricken from said money-payment rolls, during the period from 1916 to February 17, 1919, were paid the shares in all money payments made during said period to which they were entitled under the Solicitor's opinion of February 17, 1919, (R., 35).

January 8, 1927, the solicitor for the Department of the Interior rendered an opinion in the case of Jane B. Andrews, applicant for enrollment on the money-payment rolls of the Chippewa Indians of Minnesota (R., 37, 51-70), in which he overruled the practice that had at all times theretofore obtained since March 4, 1890, his predecessor's opinion of February 17, 1919 (R., 70), confirmed by Act of April 14, 1924 (R., 35).

adopted the ruling which the Indian Bureau attempted to establish in 1916, and held, in substance, that a right to share in the money payments under Section 7 of the Act of 1889 and the agreements entered into thereunder, was dependent upon *"tribal membership, tribal affiliation, recognition and residence on an Indian Reservation"* (R., 69).

Following said opinion of January 8, 1927, citation was issued upon Sarah Kadrie, next friend, mother and natural guardian of respondents, requiring her to show cause why the names of respondents, her children, should not be stricken from the money-payment rolls. Thereafter, and in due course, Sarah Kadrie made answer to said citation, setting out the descent of appellants from an enrolled parent, their Indian blood, previous enrollment, and alleging that as their rights had theretofore been put in issue upon the same basic facts upon which the citation issued and determined in the opinion of February 17, 1919, which opinion had long since become final, they could not further be inquired into by the Secretary. On October 1, 1927, the then Secretary of the Interior signed an order (R., 37, 38), in part as follows:

> "From a consideration of all the facts in this case, which are not being recited, but are contained in the record, it is clear that these children were never entitled to enrollment and should never have been enrolled with the Chippewa Indians of Minnesota following the rule laid down by the United States Circuit Court of Appeals in the case of Julia B. Oakes *et al. v.* United States (172 Fed. Rep. 305), and the prac-

> tice of the Department prior to the Mahaffie opinion of February 17, 1919. Therefore the names of Mary I., Evelina, Amit K., Bertha, Mailivan E., Marie, Dorothy, Elmer and Omar Kadrie are hereby stricken from the rolls of the Chippewa Indians of Minnesota. You will make proper notation on the records of your office."

November 21, 1927, formal notice was given all the Chippewa Indians of Minnesota by the department that "all further distributive shares of the money payments to any person enrolled under the opinion of February 17, 1919, will be withheld and suspended, pending further departmental action" (R., 38.)

Thereupon respondents (R. 2-12) petitioned the Trial Court for a writ of mandamus, requiring petitioner's predecessor to restore their names on the supplemental rolls of the Chippewa Indians of Minnesota, and to pay them their *per capita shares* in all future payments thereafter made under the authority contained in Section 7 of the agreements approved March 4, 1890, and for general relief. The Secretary answered (R. 13-19), and the case was heard upon the record now before this Court. March 29, 1928, the Trial Judge filed an opinion (R. 20), in the following words:

> "On the whole I am inclined to agree with the opinion of the Solicitor of the Department in the Patterson opinion, and therefore the petition will be dismissed. I am influenced also by the fact that the Secretary of the Interior has a wide discretion in determining questions of law as well as of fact."

Judgment was thereupon entered in conformity with said opinion, objections and exceptions being noted, and appeal bond filed. After the appeal had been perfected, the Trial Judge expressed a desire to reconsider his opinion. I quote from page 33 of Petitioner's Brief filed in the Court of Appeals:

> "Some time after his decision was filed the Trial Judge suggested that if any appeal had not been perfected he would consider a motion for rehearing. The appeal had been perfected."

Since the names of respondents were stricken from the roll by order of the Secretary dated October 1, 1927 (R., 37-8), and subsequent to the institution of this action, Congress by the Act of March 15, 1928 (Public No. 172, 70th Cong.), directed a further distribution of the principal fund.

ARGUMENT.

Let us now consider the errors assigned and relied upon by Petitioner.

Assignments 2, 3 and 4 are interrelated and may properly be considered together.

Assignments of Error 2, 3, and 4.

Assignments 2, 3 and 4 (R., 10) are in substance that the Court below correctly held that respondents were entitled to share in the division of the *corpus* of the trust at the expiration of the fifty-year trust period, but that the Court erred in holding that as respondents

were the lineal issue of a Chippewa Indian duly enrolled as such on the census rolls made by the Commission under the Act of January 14, 1889, they were entitled to share in the interest annually accruing on the *corpus* of said fund during the fifty-year trust period.

Thus the only question presented by these three assignments is as to the right of respondents to share in the distribution of the *interest* annually accruing on the trust fund. Their right to equal distributive shares of the *principal* of the fund when and as distributed is conceded. As the greater portion of the principal fund has already been distributed under Acts of Congress, the rolls from which respondents' names were stricken being the sole basis for all payments of interest and distribution of the principal (R. 35), and as respondents have been denied any participation in the last payment from the principal (Act of March 15, 1928) solely because their names did not appear on the money payment rolls, it is apparent that the contention now made by petitioner is raised for the first time in the thirty-nine years during which payments have annually been made.

Counsel for Petitioner (Pet. pp. 14-17) in their Brief (Pet. 15) elucidates these three assignments. It is conceded that the distribution of the interest annually accruing on the principal fund during the fifty-year trust period is governed exclusively by Section 7 of the Act of January 14, 1889 (R. 28), as embodied in the agreements (R. 29). It is contended (Pet. 15) that as one-half of the interest annually accruing is to be

paid in cash, in equal shares to "heads of families and guardians of orphan minors," and one-fourth is to be paid in equal shares *per capita* to all other classes of Indians, respondents must bring themselves within one of said classes. No payment from the principal of the trust fund or interest arising thereon has ever been made *per stirpes,* all payments having been made *per capita* (R. 38). This practice was adopted when the the first interest payment was made, pursuant to the construction of Section 7, *supra,* by the Commission while negotiating the agreements, and which construction was accepted and relied upon by the Indians. It was approved by the Comptroller by decision dated October 21, 1896 (3 Comp. Dec. 158). (See Statement of Facts.) Immediately following the approval of said agreements on March 4, 1890, the officers of the Department, before each payment was made took the original census rolls prepared by the Commission, struck off the names appearing thereon of persons who had died, and added thereto the names of the *lineal issue* of all persons enrolled on the census rolls, *irrespective* of where the issue were born, tribal recognition, or affiliation; all reservations, tribal officials and tribal governments having disappeared with the approval of the agreements on March 4, 1890, (R. 39-44). This practice continued for twenty-six years or until 1916 when it was set aside by the Indian Bureau (R. 32), and was restored by the Solicitor's Opinion of February 17, 1919 (R. 46), and the action of the Indian Bureau vacated. Following the Solicitor's Opinion, Congress by the Act approved April 14, 1924, author-

ized the Secretary to pay such amounts as he might find due any person who had been erroneously omitted or stricken from the rolls (R. 35), and under this authority the Secretary enrolled and restored to the rolls those persons whose names had been stricken therefrom or who had been denied enrollment under the action taken by the Indian Bureau in 1916, and prior to the Solicitor's Opinion, including respondents (R. 35). The Solicitor's Opinion of February 17, 1919, remained in full force until January 8, 1927. Thus the issue of the original enrollees born between March 4, 1890, and January 8, 1927, *irrespective* of the place of their birth, tribal recognition or affiliation, were enrolled and received their distributive shares of all interest payments and payments from the principal fund. Respondents come within this class. Thus the practice of making all payments *per capita* and of enrolling all issue of original enrollees and paying them *per capita* shares in all money payments was adopted immediately following the approval of the agreements and continued in full force for thirty-seven years thereafter. Unless it is clearly erroneous, a long continued, uniform construction of an act substantially contemporaneous with its enactment, is sufficient ground to regard the question as settled, under the well-established doctrine that in cases of doubt the executive practice will be treated as the true construction of the act. Edwards's Lessee *v.* Darby, 12 Wheat. 206; Brown *v.* United States, 113 U S., 568; United States *v.* Hill, 120 U. S 169-182; United States *v* Healey, 160 U. S. 136; Wisconsin *v.* Illinois (decided Jan. 14, 1929, by this Court).

The question now assigned as error was not raised by petition, answer, evidence or argument in the Trial Court. In the Trial Court, respondents here, petitioners there, asserted an absolute right under Section 7 of the Act of January 14, 1889 (R. 28), as embodied in said agreements (R. 29) to enrollment on the rolls maintained by the department as a basis for all money payments, and to equal *per capita* shares in all distributions of interest annually arising on the principal fund and of the principal fund, by reason of the fact that they were the *lineal issue* of a member of one of the former bands of tribes regularly enrolled on the census rolls (R. 5, 7-8), following the Solicitor's Opinion of February 17, 1919 (R. 46, at 50-1), and the practice that had theretofore prevailed. Petitioner here, respondent there, denied the claimed rights on the stated ground (R. 14, 17), that being the *lineal issue* of an enrolled ancestor did not in itself entitle respondents to enrollment and to participation in the division of the fund "because they were born away from the Indian reservation, tribal relation, and under conditions showing that their parents had abandoned the habits and customs of their Indian tribesmen and adopted those of civilized life," following the Solicitor's Opinion of January 8, 1927 (R. 51 at 69). Upon this issue the case was tried.

As assignments 2, 3 and 4 present questions not disclosed by the record and not considered by the Courts below this Court will not review them.

Edward Hines Yellow Pine Trustees *v.* Martin, 268 U. S. 458, 465.

Assignments of Error 5, 6, 7, and 8.

Assignments 5, 6, 7 and 8 may be properly considered together. Section 7 of the Act of January 14, 1889, as embodied in the agreements designated the original enrollees and *their issue* as the sole beneficiaries of the money payments. The Secretary found as a fact that respondents are the issue of an original enrollee. When he indentified them as such, his discretion was exhausted, and there remained merely the performance of the ministerial duty of paying respondents their *per capita* shares of the money payments. United States *ex rel.* Besaw *v.* Work, 6 Fed. (2d) 694; Work *v.* United States *ex rel.* Gouin, 18 Fed. (2d) 820; Ballinger *v.* Frost, 216 U. S. 240; Lane *v.* Hoglund, 244 U. S. 174; Work *v.* Mosier, 261 U. S. 353.

The record discloses that the Department maintained certain rolls used as a basis for all payments made to the Chippewa Indians under Section 7, *supra.* Petitioner, or his predecessor, by order dated August 29, 1927 (R. 38), directed that the names of respondents should be "stricken from the rolls of the Chippewa Indians of Minnesota." By striking the names of respondents from said rolls they were denied all right to share in either the interest payments or the payments from the principal fund. The judgment of the Court below directing the restoration of the names of respondents to said rolls and requiring petitioner to pay them their *per capita* shares in all future payments was therefore proper.

No Valid Reason Assigned for Granting the Writ.

The question decided by the Court of Appeals relates exclusively to the Chippewa Indians of Minnesota. It has no application to any other Indians. The ruling of the Court confirms a practice that prevailed for thirty-seven years in the administration of the trust fund, and under which the greater portion of the *corpus* of the fund has been distributed. A reversal, at this late day, of the long-established practice would raise a question as to the liability of the United States for all the money distributed under the former practice.

The question raised by the petition presents only a diversity of opinion between two former Solicitors of the Department. The Trial Judge after entering the judgment in the Trial Court sought an opportunity to reconsider the matter. The case had then passed beyond the control of the Trial Court, and the mistake was corrected by the Court of Appeals.

The decision and judgment of the Court of Appeals is so manifestly proper that a review by this Court would be useless.

For the above and foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

WEBSTER BALLINGER,
Attorney for Respondents.

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 77

RAY LYMAN WILBUR, SECRETARY OF THE INTERIOR,
PETITIONER,

v.

UNITED STATES OF AMERICA EX REL. MARY I. KADRIE, EVELINA KADRIE, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

RESPONDENTS' BRIEF.

WEBSTER BALLINGER,
Attorney for Respondents.

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RESPONDENTS' BRIEF.

Action of Courts Below.

The case is here on certiorari (R. 60) to the Court of Appeals of the District of Columbia to review the

judgment of that court (R. 58-9) reversing the judgment of the trial court (R. 14). Memorandum opinion of the trial judge (R. 14) and the opinion of the Court of Appeals (R. 52-8) appear in the record; the latter opinion is also reported in 30 F. (2d) 989.

Statute Involved.

Prior to January 14, 1889, there were eleven bands or tribes of Chippewa Indians occupying ten separate, widely scattered reservations in the State of Minnesota (H. R. Ex. Doc. 247, 51st Cong., 1st Session; R. 29). The act of January 14, 1889 (Sec. 1; R. 18-20) authorized the President to appoint Commissioners "to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except that White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said Commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated." The cessions required the assent in writing of two-thirds of the male adults over eighteen years of age of the band or tribe of Indians occupying and belonging to each reservation, except as to the Red Lake Reservation, the cession of which was to be deemed sufficient if assented to by two-thirds of the male adults of "all the Chippewa Indians in Min-

nesota." All agreements required the approval of the President before taking effect. Allotments in severalty theretofore made upon any of the reservations could not be disturbed, except with the consent of the allotee.

For the purpose of ascertaining whether the proper number of Indians assented to the agreements, and for the purpose of making the allotments and *payments* provided for in the Act, the Commissioners were directed while engaged in the work of securing the cessions, and before completing the same, to "*make an accurate census of each tribe or band.*"

Section 3 directed that when the census was taken and the cessions obtained, approved, and ratified, all of the Indians, except those on the Red Lake Reservation, those who had theretofore taken allotments, and those who desired at the time of removal to take their allotment on the reservation where they were then living, "shall * * * be removed to and take up their residence on the White Earth Reservation, and there alloted land in conformity with the Act of February 1887, out of the lands reserved for allotment purposes." The Indians belonging on the Red Lake Reservation were to receive allotments out of the lands reserved for that purpose on the Red Lake Reservation.

Sections 5 and 6 (R. 19) provided for the classification, appraisal, and sale of all of the ceded lands not alloted at not less than the minimum price therein fixed, and by Section 7 (R. 19-20) the net proceeds received therefrom were to be deposited in the Treasury of the United States "*to the credit of all the Chippewa In-*

dians in the State of Minnesota'' as a permanent fund, which should draw interest at the rate of 5 per cent per annum, payable annually for the period of fifty years. One-half of the interest annually accruing on the principal fund was to be paid annually in cash, in equal shares "to the heads of families and guardians of orphan minors for their use," one-fourth was to be paid annually "in cash, in equal shares *per capita* to all other classes," and the remaining one-fourth was, during the fifty-year period under the direction of the Secretary of the Interior, to "be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit." At the expiration of the fifty-year trust period, the permanent fund was to be divided and *"paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."*

NOTE.—The only property right conferred by the agreements to which tribal membership was attached, was the right to an allotment of land, the allotments being confined to the then members of the bands or tribes whose names appeared on the census rolls. Subsequent to the approval of the agreements, no authorization is contained for the maintenance of any Indian reservation or any form of tribal government. The schools provided in Section 7 were to be located among the Indians "in their midst and for their benefit," no mention being made of their location upon any Indian Reservation. Rights to share in the money payments under Section 7 were limited to the Indians whose names appeared on the census rolls and their issue.

Intent and Purpose of Act as Declared by Committee of Congress.

The report of the House Committee on Indian Affairs on the bill that became the said Act of January 14, 1889, contained the following statement of the intent and purpose of said legislation:

> "The bill is in the nature of a proposal to the Indians, and if not accepted by them in inoperative, and nugatory. If accepted and assented to by at least two-thirds of the male adults of each band, the bill, as passed, becomes effective. *In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens,* * * *" (R. 20).

Agreements Entered Into under said Act.

Agreements were entered into with all of the tribes or bands embodying the plan set out in said Act of January 14, 1889, and on March 4, 1890, approved by the President of the United States, and as expressly declared in said Act, thereupon "took effect" (R. 20).

The Question for Decision.

Petitioner contends that under Section 7 of the Act of January 14, 1889 (R. 19-20), as embodied in the agreements (R. 20), the trust fund should be regarded as a *tribal* fund; that a right to participate in the distribution of the interest annually accruing thereon is limited to *tribal* members, and that only children born during the fifty-year trust period possessing the status of tribal members can lawfully participate in the

annual division of said interest and in payments from the principal fund.

Respondents contend that the fund is held under a specific trust created by said section of said Act and agreements for the exclusive benefit of a designated class as individuals, to which no condition of tribal membership attached, and that proof that a child born during the fifty-year period is the lineal issue of a former member of the bands or tribes alone entitles the child to enrollment and to equal *per capita* shares in all payments of interest annually accruing on the fund and in the distribution of the fund itself.

Statement of Fact.

Petitioner's "Statement of Fact" (Brf. 5-9) is silent as to many pertinent facts which respondents deem material to a proper understanding of the errors assigned and relied upon. Hence a more complete statement becomes necessary.

Following the approval of said agreements, all of the unallotted members of the various tribes or bands, exclusive of the Red Lake Band, were either removed to the reserved portion of the former White Earth Reservation, where they established their residence, and were there allotted land, or were permitted to take their allotments out of the ceded lands which were part of the former reservations upon which they resided (R. 20). All of the lands reserved for allotment purposes on the White Earth Reservation were allotted (R. 21). By Act of June 21, 1906, all restrictions as to sale, encumbrances or taxation on all lands

allotted on the White Earth Reservation, and then or thereafter held by adult mixed bloods, were removed (R. 21). Since March 4, 1890, there have been *no band or tribal governments, chiefs, or councils, and no Indian reservation in Minnesota,* except the Red Lake Reservation, which was created under the Act of February 20, 1904, and with which we are not here concerned (R. 30-31).

The United States assumed the duty and obligation of making all payments under Section 7, and that duty devolved upon petitioner and his predecessors in office (9 Stat., 395, now T. 5, Sec. 485, U. S. C. A.).

Immediately following the approval of the agreements, the practice was adopted of making all payments under Section 7 *per capita* (R. 27), which practice was approved by the Comptroller of the Treasury October 21, 1896 (3 Compt. Dec., 158), said practice and ruling being more fully hereinafter explained under "Argument I".

The "census rolls" formed the evidentiary basis for all money payments under Section 7 to those persons in being when said rolls were made. The interest payments to be made annually were for the benefit of the children born during the fifty-year period as well as those in existence when the "census rolls" were made.

Accordingly, as a basis for the first payment made under Section 7, the agent of the United States in charge of the payment took the original census rolls and revised them by striking therefrom the names of all persons appearing thereon who had died since rolls were made and adding thereto the names of all chil-

dren born since the census rolls were made to parents who were enrolled on said census rolls. In adding the names of new-born children the only proof required was that the children were the children of parents whose name appeared on said census rolls, no proof of tribal or band membership, residence, affiliation with, or recognition by, a tribe or band being required. Thereafter and preceding each succeeding payment of either interest money, or from the principal, the rolls were similarly revised. This practice continued, with a slight interruption, from March 4, 1890, to January 8, 1927 (R. 27-32). The original census rolls, as thus annually revised only to the extent stated, became permanent rolls of the Chippewa Indians of Minnesota, upon the basis of which all money payments under Section 7 have been made *per capita*. Enrollment on said rolls was a condition precedent to participation in all money payments made under Section 7 (R. 26, 27-32, 36). These rolls were expressly recognized in the Act of April 14, 1924 (43 Stat., 95), as the basis for money payments under Section 7 (R. 25). No authorization by Congress for the payment of the annual interest was necessary. By Act of May 18, 1916 (39 Stat., 123, at 135), Congress inaugurated a policy in aid of the Indians of making partial distributions of the principal fund before the expiration of the fifty-year trust period. Under that act one-fourth of the principal fund was distributed *per capita*. Thereafter Congress has from time to time directed the distribution of a part of the principal fund, the last authorization being contained in the Act of March 15, 1928 (45

Stat., 314), which directed payment of $25.00 "to each of the enrolled Chippewa Indians of Minnesota."

Mary Blair, grandmother of respondents, a mixed-blood Chippewa Indian, and a recognized and enrolled member of the White Earth Band, established her residence upon, and was allotted land out of the lands reserved for allotment purposes on the White Earth Reservation (R. 20-1).

In the year 1892 there was born to Mary Blair at Richmond, Minnesota, in lawful wedlock, a child, Sarah Cogger, now Sarah Kadrie. Following her birth, she was enrolled, and her name has ever since remained on said rolls and she has at all times subsequent thereto received a *per capita* share of all money payments thereafter made (R. 21).

In 1909, Sarah Cogger married Mall Kadrie, a naturalized citizen of the United States, as a result of which union there were born to Sarah Kadrie, in lawful wedlock, the following children, on the following dates and at the following places (R. 21):

Name.	Date.	Place of birth.
Mary I. Kadrie	1/10/10	Canada.
Evelina "	5/11/11	"
Amit K. "	3/30/14	"
Bertha "	3/31/16	"
Mailivan E. "	3/31/18	International Falls, Minn.
Marie "	9/ 9/20	" " "
Dorothy "	8/29/22	" " "
Elmer "	1/ 5/25	" " "
Omar "	2/ 9/27	St. Paul, Minn.

Following the births of the three first-born children, their names were inscribed upon the money-payment

rolls by the officers and agents of the United States (R. 21), in conformity with the established practice (R. 27-31).

Following the birth of Bertha, the fourth child of Sarah Kadrie, application was made for her enrollment at the White Earth Agency. The application was transmitted to the Commissioner of Indian Affairs July 11, 1916 (R. 21-22). July 20, 1916, the application was returned to the Superintendent for investigation (R. 22). July 28, 1928, the Superintendent reported that Bertha was a child of Sarah Kadrie, who was of three-eighths Indian blood; that the mother, Sarah Kadrie, married a white man, and "left the reservation several years ago"; that the child was born in Winnipeg, Manitoba, Canada, "among the white people," of a white father, and that the parents had not lived among, or affiliated with, the Indians of said reservation since its birth. The Superintendent recommended the disallowance of the application under paragraph 324 of the regulations issued under the Act of June 7, 1897, (30 Stat 90, R. 22). August 2, 1916, the Indian Office approved the recommendations of the Superintendent (R. 22-3).

At about the same time the above action was taken in the case of Bertha, and in the year 1916, the Superintendent located at White Earth, and in charge of the money-payment rolls, recommended to the Indian Bureau that the names of a number of children and grandchildren of originally enrolled and allotted parents and grandparents whose names had been inscribed on the money-payment rolls be stricken therefrom on

the stated ground that under said regulations issued under said Act of June 7, 1897, and the opinion of the Circuit Court of Appeals in the case entitled Oakes *v.* United States (172 Fed. 305), they were not entitled to have their names on said rolls and to receive distributive shares of the money payments from the trust estate as they had not been born to membership in the tribe, had not affiliated with, and had not been recognized by the tribe as members thereof. The Indian Bureau concurred in the recommendations of the Superintendent and directed that the names of said children be stricken from the money-payment rolls, which orders were carried into effect (R. 24).

Sarah Kadrie, mother, natural guardian, and next friend of Mary I., Evelina, and Amit K. Kadrie, petitioned the Secretary of the Interior for a revocation of the order of the Indian Bureau under which the names of her minor children had been stricken from said money-payment rolls (R. 24). Similar petitions were filed by the Indian parents or ancestors of the other children whose names had been stricken from said rolls by like orders of the Indian Bureau. The question presented for decision by each of the separate petitions being identical or substantially identical, the petition filed by Sarah Kadrie on behalf of her minor children was selected as a test case and was referred to the then Solicitor for the Department for an opinion determinative of the rights of all (R. 24). On February 17, 1919, the Solicitor rendered an opinion (R. 24, 33-7) reversing the action taken by the Indian Bureau in all the cases and directing the restoration

to the rolls of the names of respondents and all other Indian children of like status. As to the rights of respondents, the Solicitor (R. 33-7) held:

> "In the particular case giving rise to a call for this opinion, Sarah Kadrie, née Cogger, was a full-blood Chippewa Indian woman born on the reservation in the year 1892—subsequent to the cession and the original enrollment. She was an only child of her mother, a member of the original enrollment. As such, she is entitled to participate for herself in the annuities; and that right is accorded to her. She married, in 1909, Mall Kadrie, a native of Syria, and since then has resided with him mainly in Canada, but for a short time in Syria—and at no time on the reservation, although occasionally visiting it. There have been born of said marriage four children, the oldest now about nine years of age. Her three oldest children were for some years enrolled among the Chippewa Indians, and she was paid annuities for them, until the year 1917, when, by direction of the Indian Bureau, their names were stricken from the roll and their annuities withheld. At the same time, the enrollment of the youngest child was refused.
>
> "In my opinion, this action was erroneous, and should be corrected. Sarah Kadrie and her children are 'issue' of her mother, a full-blood Chippewa Indian duly enrolled, and as such they will be entitled, at the expiration of the trust period, to share in the distribution of the trust fund; and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited

> either by acquiring foreign citizenship or by abandoning, or failing to acquire, residence on the Indian reservation or with the tribe."

Thereupon the names of Mary I., Evelina, and Amit K. Kadrie were restored to said rolls, and the names of the other six children of Sarah Kadrie were placed upon said rolls following their births, and all of them received their distributive shares of all money payments made prior to October 1, 1927 (R. 25).

The opinion of the Solicitor rendered February 17, 1919, was adhered to in all cases of enrollment of newborn children down to January 8, 1927.

Between 1916 and 1919, during which period the names of many Indian children were stricken from the rolls by orders of the Indian Bureau, reversed by the Solicitor's opinion of February 17, 1919, and thereafter reinstated, payments had been made to the Chippewa Indians in which said children, as well as other children born during said period and of like status, did not participate solely because their names had been stricken or omitted from the money-payment rolls. To enable the Secretary to pay said children the shares to which they were entitled under said opinion of February 17, 1919, Congress enacted the Act approved April 14, 1924 (43 Stat. at L., 95; R. 25). By this Act, the Secretary was "authorized to pay, out of any moneys belonging to the Chippewa Indians of Minnesota, such amounts as he may find due any persons of Chippewa blood *whose names may have been erroneously omitted or stricken from the Chip-*

pewa annuity rolls, or who may have been or may hereafter be *found entitled to enrollment for annuity payments authorized by Section 7 of the Act of Congress approved January* 14, 1889" (R. 25). Under the authority contained in said Act, all Indian children lineal issue of enrolled ancestors who were either refused enrollment, or whose names were stricken from said money-payment rolls, during the period from 1916 to February 17, 1919, were paid the shares in all money payments made during said period to which they were entitled under the Solicitor's opinion of February 17, 1919.

January 8, 1927, the solicitor for the Department of the Interior rendered an opinion in the case of Jane B. Andrews, applicant for enrollment on the money-payment rolls of the Chippewa Indians of Minnesota (R. 26, 37-51), in which he overruled the practice that had at all times theretofore obtained since March 4, 1890, his predecessor's opinion of February 17, 1919 (R. 51), confirmed by Act of April 14, 1924 (R. 25), adopted the ruling which the Indian Bureau attempted to establish in 1916, and held, in substance, that a right to share in the money payments under Section 7 of the Act of 1889 and the agreements entered into thereunder, was dependent upon "*tribal membership, tribal affiliation, recognition and residence on an Indian Reservation*" (R. 48, 50).

Following said opinion of January 8, 1927 (R. 26), citation was issued upon Sarah Kadrie, next friend, mother, and natural guardian of respondents, requiring her to show cause why the names of respondents,

her children, should not be stricken from the money-payment rolls. Thereafter, and in due course, Sarah Kadrie made answer to said citation, setting out the descent of respondents from an enrolled parent, their Indian blood, previous enrollment, and alleging that as their rights had theretofore been put in issue upon the same basic facts upon which the citation issued and determined in the opinion of February 17, 1919, which opinion had long since become final, they could not further be inquired into by the Secretary (R. 26). On October 1, 1927, the then Secretary of the Interior signed an order (R. 26, 27), in part as follows:

> "From a consideration of all the facts in this case, which are not being recited, but are contained in the record, it is clear that these children were never entitled to enrollment and should never have been enrolled with the Chippewa Indians of Minnesota following the rule laid down by the United States Circuit Court of Appeals in the case of Julia B. Oakes *et al. v.* United States (172 Fed. Rep. 305), and the practice of the Department prior to the McGaffie opinion of February 17, 1919. Therefore the names of Mary I., Evelina, Amit K., Bertha, Mailivan E., Marie, Dorothy, Elmer and Omar Kadrie are hereby stricken from the rolls of the Chippewa Indians of Minnesota. You will make proper notation on the record of your office."

The annual interest payment for 1927 had accrued on June 30 of that year and was to be made the following December. Others would follow annually thereafter. Following the policy adopted by Congress, fur-

ther authorizations for *per capita* payments from the principal fund to the enrolled Chippewa Indians of Minnesota were to follow. In view of the conflicting opinions of the two Solicitors, dated, respectively, February 17, 1919 (R. 33-37), and January 8, 1927 (R. 37-51), the Secretary's order of October 1, 1927 (R. 26-7), was intended to provide a basis for a test case in order that the rights of respondents, and all others similarly situated, in all future money payments might be finally determined. Accordingly, November 21, 1927, formal notice was given all the Chippewa Indians of Minnesota by the Department that "all further distributive shares of the money payments to any person enrolled under the opinion of February 17, 1919, will be withheld and suspended pending further departmental action" (R. 27). The departmental action referred to will follow the final determination of this case.

The intent, object, purpose, and effect of said order of October 1, 1927, striking the names of respondents "from the rolls of the Chippewa Indians of Minnesota" (R. 27), was to deny respondents all right to participation in any and all future distributions of the interest annually accruing on the principal fund, and in all future distributions from the *corpus* of the fund, and such rights have in fact been denied respondents in all interest payments, and in the payment from the principal fund under the Act of March 15, 1928 (45 Stat. 314), made since their names were stricken from said rolls. Respondents thereupon, and on October 17, 1927, petitioned the trial court for a writ

of mandamus requiring petitioner's predecessor "to restore or cause to be restored" the names of respondents on said rolls "and to pay them their *per capita* shares in all future money payments that may be made under the authority contained in Section 7 of said agreements approved March 4, 1890" (R. 8). Petitioner answered (R. 9-13), and the case was heard in open court. March 29, 1928, the trial judge filed a memorandum opinion (R. 14) denying the writ. April 12, 1928, judgment was entered for petitioner (R. 14), from which respondents prosecuted an appeal to the Court of Appeals, where the judgment of the trial court was reversed and the cause remanded to the trial court "for further proceedings not inconsistent with the opinion of this court" (R. 59). The case is here on certiorari to review the judgment of the court below, eight grounds of error being assigned (Pet. for Writ, pp. 10-11), three of which have been abandoned (Pet., Brf. 10-11).

ARGUMENT.

The five grounds of error now urged have been further reduced to four basic grounds (Brf. 13-28). These four basic grounds will now be considered in their numerical order, the captions being omitted.

I.

The first proposition advanced (Brf. 14-19) is that the trust fund held under Section 7 of the Act of January 14, 1889, as embodied in the agreements, and the

interest annually accruing thereon, *should be regarded as tribal property*, and that only *tribal members* are entitled to participate in the annual distribution of the income from the fund. It is not claimed by petitioner that the fund is *in fact tribal property*. Thus there is presented in slightly different form the identical question which gave rise to this suit and originated in an opinion by the then Solicitor for the Department, filed January 8, 1927 (R. 26, 37-51), reversing a construction and practice that had theretofore obtained from March 4, 1890 (R. 27-32), affirmed by opinion of a prior Solicitor February 17, 1919 (R. 24, 33-7), and recognized and confirmed by Act of Congress of April 24, 1924 (R. 25).

The two opinions of the Solicitors construing the character of the fund and rights therein under Section 7 are directly in conflict. The construction contained in the Solicitor's opinion of January 8, 1927 (R. 37-51), forms the basis for the construction here insisted upon by petitioner. The construction contained in the Solicitor's opinion of February 17, 1919 (R. 33-7), is accepted and relied upon by respondents as the correct construction.

The Solicitor's opinion of February 17, 1919, was rendered in a proceeding in which the rights of the three oldest respondents to have their names restored to the rolls (their names having been shortly theretofore stricken therefrom by order of the Indian Bureau), and to receive shares in all money distributions under Section 7, and also the right of the fourth oldest respondent to have her name inscribed on said rolls, and

to participate in all money distributions under Section 7, were directly in issue. The case was made a test case, there being also in issue the rights of other Indian children similarly situated (R. 24-5). The Solicitor held that "the trust for allotments is distinct from that touching the funds, proceeds of the unallotted and unreserved lands thrown open to sale. The trust touching the fund has as its beneficiaries, not the Indian *as a tribe* (the settlers), but the *Indians as individuals* (R. 33)." He further held (R. 34) that nowhere in the trust, so far as it relates to the money payments, "is either residence with or continued or 'recognized' membership of the tribe, or birth on the reservation, or United States citizenship, or any other qualification mentioned, save only being a 'Chippewa Indian,' *i. e.*, possession in whole or in part of the blood of one of the originally enrolled members of that tribe." As to the rights of the three oldest respondents, he held (R. 36-7) that as they were the children and grandchildren of an enrolled mother and grandmother, they were entitled as of right to have their names restored to the rolls and to receive the annuities that had been withheld. As to the fourth oldest respondent, he held that she, being the child of an enrolled parent and the grandchild of an enrolled grandparent, was entitled as of right to enrollment and to a distributive share in the annuities arising under Section 7. The above construction was adopted and affirmed by the court below (R. 52-8). The Solicitor thus affirmed the practice that had obtained theretofore from March 4, 1890 (R. 27-32).

Following said opinion, the names of the three first born respondents and the names of all other Indian children similarly situated theretofore stricken from said rolls were restored, and the name of the fourth-born respondent, as well as the names of all other children similarly situated and born subsequent to the order of the Indian Bureau of August 2, 1916, were enrolled (R. 24). The Act of April 14, 1924, recognized and confirmed the Solicitor's construction of Section 7 in the opinion of February 17, 1919 (36 Cyc. 1142, Legislative Construction), and under that Act all Indian children, including respondents, who were either refused enrollment or whose names were stricken from said money-payment rolls during the period from 1916 to February 17, 1919, under the action of the Indian Bureau, were paid *per capita* shares in all money-payments theretofore made during said period.

By decision dated November 6, 1924 (unreported and not referred to in the record), in the case entitled "Application of Ralph L. Connors for back annuity payments," the then Solicitor affirmed his predecessor's opinion of February 17, 1919, in these words:

> "It is well settled by both court and departmental decisions that the right to participate in the distribution of tribal funds arising under section 7 of the act of January 14, 1889, rests upon a different basis than does the right to an allotment out of tribal lands. The latter right is dependent upon tribal membership once existing (Oakes *et al. v.* United States, 172 Fed., 305) and perchance residence on the reservation (Minnie H. Sparks, 36 L. D., 234) while the

former right is *not* dependent upon enrollment or recognition by the tribe as a member."

The Solicitor's opinion of January 28, 1927 (R. 37-52), was rendered in the case "of Jane B. Andrews, applicant for enrollment on said rolls" (R. 26). The Solicitor held the trust fund under Section 7 to be a *tribal fund* in which only *tribal members* could participate (R. 48). Tribal membership flowed from birth to an enrolled parent, recognition by the band or tribe, tribal or band affiliation, and residence on a reservation (R. 50). The prior Solicitor's opinion of February 17, 1919, was expressly overruled "in so far as it conflicts with prior rules, practice, and decisions." The only decisions or practice prior to the Solicitor's opinion of February 17, 1919, in conflict therewith were the ruling of the Indian Bureau in 1916 (R. 22-3), the decision in the Oakes case (172 Fed. 305) as misconstrued in the opinion of January 8, 1927, and the practice following the Indian Bureau's order of August 2, 1916, and continuing to February 17, 1919. All decisions, rules, and practice prior to 1916 were in exact conformity with the Solicitor's opinion of February 17, 1919.

The error committed by the Solicitor in the opinion of January 8, 1927, was in misconstruing the opinion of the court in the Oakes case (172 Fed. 305) as holding that both the right to share in the distribution of the net proceeds received from the sale of the ceded lands (which is governed exclusively by Section 7) and the right to an allotment of land (which is governed exclusively by Sections 1 and 3 of the Act of 1889) are dependent upon membership in the tribe.

Counsel ignore the fact that the act of February 6, 1901 (31 Stat. 960), under which the Oakes case was brought, conferred jurisdiction upon the court to determine only a right to an allotment of land. It conferred no authority upon the court to determine a right to share in the money payments under Section 7.

This error contained in the Solicitor's opinion of January 8, 1927, is made plain in the opinion of the Court of Appeals (R. 52-8), wherein the court (R., at 55-6), says:

> "The opinion is based chiefly upon the decision in the case of Oakes *et al. vs.* United States, 172 Fed. 305. In that case the right to claim allotment under the act of 1889 was involved. * * *
>
> "We think the decision in the Oakes case is not controlling here. In that case the court was considering the rights to allotments under the act of 1889. Of course, the only Indians entitled to allotments were Chippewa Indians then living in the State of Minnesota. The after-born issue of these Indians would have no standing in securing allotments under the act. But Section 7 of the act, relating to the placing of the funds in the Treasury and the distribution of the interest arising from the funds and of the fund itself at the termination of 50 years, treats of a different matter. It looked to and contemplated conditions that might arise in the meantime, not to conditions present at the time the act was passed and, for that reason, provision was made for the distribution of this fund 'to the Chippewa Indians and their issue, then living, in cash, in equal shares.' "

Since March 4, 1890, there have been no band or tribal reservations, no band or tribal governments, chiefs, or councils (R. 31-2), thus rendering it impossible for any child born since March 4, 1890, to have acquired tribal or band membership by birth on a reservation, recognition by any official or officials of a tribe or band, or affiliation with the members of any band or tribe.

The Solicitor's opinion of January 8, 1927, if adhered to, excludes from participation in all money payments under Section 7 all children born since March 4, 1890, to enrolled parents and would confine such payments exclusively to the original enrollees, but few of whom will be alive at the expiration of the fifty-year period.

Counsel for petitioner now concedes that respondents, and all other issue of persons whose names appear on the original census rolls, will be entitled to participate in the final distribution of the principal fund, but deny their right to share in the distribution of the interest annually accruing on the fund (Brf. 13), which latter they contend should be regarded as tribal property. In support of this latter contention, reference is made to the case of Morrison *v.* Fall, 290 Fed. 306, and, on appeal, Morrison *v.* Work, 266 U. S. 481 (Brf. 14-15). In that case there was no question presented, considered, or determined relating to the distribution among the Indians of the interest annually accruing on the principal fund, nor was any question considered or determined that throws any light upon the question now before the court, as will appear from an examination of the decisions.

Following the Solicitor's opinion of January 8, 1927, citation issued upon the mother of respondents to show cause why their names should not be stricken from the rolls. Respondents answered setting out their descent from an enrolled parent, their Indian blood, previous enrollment, that their rights had theretofore been put in issue upon the same basic facts upon which the citation issued and determined in the opinion of February 17, 1919, which opinion had long since become final, and pleading said prior determination as a bar to further inquiry by the Secretary (R. 26). The Secretary ignored the plea and by order of October 1, 1927, struck respondents' names from said rolls (R. 27). This action was clearly erroneous and beyond the power of the then Secretary. The determination of the rights of respondents by the opinion of February 17, 1919, precluded further inquiry by the Department except for fraud. If it were otherwise there could be no permanency to the rolls. If each succeeding Solicitor could change and modify the decision of his predecessor upon the same facts and law, a condition bordering upon chaos would at all times exist. Rights secured under Section 7, *supra*, are not subject to the whims and fancies of succeeding Solicitors. The case of United States *v.* Atkins (260 U. S. 220) is in point. The court in that case held that the enrollment of a member of an Indian tribe by the Dawes Commission, when duly approved, amounts to a judgment in an adversary proceeding determining the existence of the individual and his right to membership, and that it could not be annulled except for fraud alleged and proven.

In United States *v.* Moser, 266 U. S. at 242, the court says:

> "The contention of the government seems to be that the doctrine of *res judicata* does not apply to questions of law; and, in a sense, that is true. It does not apply to unmixed questions of law. Where, for example, a court in deciding a case has enunciated a rule of law, the parties in a subsequent action upon a different demand are not estopped from insisting that the law is otherwise, merely because the parties are the same in both cases. *But a fact, question, or right distinctly adjudged in the original action cannot be disputed in a subsequent action,* even though the determination was reached upon an erroneous view or by an erroneous application of the law. That would be to affirm the principle in respect of the thing adjudged, but, at the same time, deny it all efficacy by sustaining a challenge to the grounds upon which the judgment was based." (Citing numerous cases.) *"A determination in respect of the status of an individual, upon which his right to recover depends, is as conclusive as a decision upon any other matter.* (Citations.)"

It will be observed that the Secretary's order of October 1, 1927, was based upon the construction of the Oakes case in the Solicitor's opinion of January 8, 1927, which has hereinbefore been shown to have been erroneous, and further upon the practice of the Department prior to the opinion of February 17, 1919, which the record shows (R. 27-32), except for the period from 1916 to 1919, to have been in exact conformity with the opinion of February 17, 1919.

II.

The second contention advanced by counsel for petitioner (Brf. 18-21) is that respondents do not come within either of the groups or classes designated in Section 7 to which the annual interest payments are to be made during the fifty-year trust period. Section 7 (R. 20) directed the payment of one-half of the interest money annually accruing in equal shares "to the heads of families and guardians of orphan minors," and one-fourth "in equal shares *per capita* to all other classes of said Indians." When the Act of 1889 was submitted by the Commissioners to the Indians for their approval, inquiry was made by the Indians of the Commissioners as to the meaning of the words "heads of families and guardians of orphan minors." The Indians desired to know who was to be considered the "head of a family"; whether the head of a family of one would receive the same amount as the head of a family of many; whether a guardian of one child would receive the same amount as the guardian of several children. The Commissioners were unable to answer these questions, and as it was the desire of the Indians and the evident intent of Congress to do equal justice, the Commissioners promised the Indians that the cash payments of three-fourths of the interest would be made "*per capita* in equal shares."

The administrative officers in making the first payments followed the practice the Commissioners had promised the Indians would be followed, of making

the payment "*per capita* in equal shares." Preceding the payment in 1896, the then Secretary referred the question to the Comptroller of the Treasury for an opinion. The Comptroller, in an opinion dated October 21, 1896 (3 Compt. Dec. 158), after referring to the reference and quoting the pertinent provisions of Section 7, said:

> "The question now raised particularly relates to the provision that one-half of the interest shall be annually paid in cash in equal shares to the heads of families and guardians or orphan minors for their use, and one-fourth of said interest shall be annually paid in cash in equal shares *per capita* to all other classes.
>
> "After a careful consideration of Section 7, I am unable to satisfactorily determine from its language what the intention of Congress was. Are the wives of the heads of families a class to be included under the phrase 'all other classes of Indians?' Strictly speaking, it would so seem; and yet this might result in such manifest injustice that, in the absence of certain language, it seems proper to hold that it was not within the contemplation of Congress in directing this distribution.
>
> "In reference to this clause the commission who negotiated this treaty said:
>
> " 'The clause of the act of January 14, 1889, providing for the payment of the interest that may accrue on the permanent fund, was to us obscure, inasmuch as it says "one-half of said interest shall be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use, and one-fourth

of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares *per capita* to all other classes of Indians," etc., and as we could neither explain this to the Indians or comprehend it so as to give it such an interpretation as would do equal justice, we promised the cash payment should be made *per capita* in equal shares.' (House Ex. Doc. No. 247, p. 24, Fifty-first Congress, first session.)

"With their statement as to the obscurity of this legislation, I fully agree, and inasmuch as this practice of making equal *per capita* payments has been uniformly followed since the passage of this act, I do not feel justified in making any other construction than that given contemporaneously with the inauguration of the enforcement of the act. Unless it is clearly erroneous, a long continued, uniform construction of an act substantially contemporaneous with its enactment, is sufficient ground to regard the question as settled, under the well-established doctrine that in cases of doubt the executive practice will be treated as the true construction of the act. (Edwards's Lessee *v.* Darby, 12 Wheat., 206; Brown *v.* United States, 113 U. S., 568; United States *v.* Hill, 120 U. S., 169-182; United States *v.* Healey, 160 U. S., 136; Bowler's First Comp. Dec., 215-223; 1 Comp. Dec., 266, *id.*, 379.)"

Long prior to the Act of January 14, 1889, Congress adopted a settled policy of encouraging the individual Indians to abandon their tribal relations and to adopt the customs, habits, and manners of civilized life. This

policy is reviewed by the court below (R. 57), quoting from Mr. Justice Van Devanter's opinion in Oakes *v.* United States, 172 Fed. 305, at 308. The Act of 1889 was enacted in furtherance of that policy. The House Committee on Indian Affairs, in its report on the bill that became the Act of January 14, 1889, declared the intention of the Act in these words:

> "The bill is in the nature of a proposal to the Indians, and if not accepted by them is inoperative, and nugatory. If accepted and assented to by at least two-thirds of the male adults of each band, the bill, as passed, becomes effective. *In brief, the bill, if accepted by the Indians, aims to break up their tribal relations and make them full citizens,* * * *."

The Act plainly contemplating that aid and assistance were to be afforded the issue of original enrollees born during the fifty-year trust period, the intention of the Act being to "break up their tribal relations and make them full citizens," and there being no limitation contained in Section 7 of rights to share in the fund to *tribal* members, the officers of the Department charged with the duty of making the money payments recognized the right of all children born to parents whose names appeared on the original census rolls to enrollment and to participate in the annual division of the interest money (R. 27-32), which policy continued until the Solicitor's opinion of January 8, 1927. All payments of the interest money being made *per capita,* the new-born children were accorded equal participation. This uniform construction, commencing im-

mediately after the approval of the agreements and continuing for a period of nearly 37 years, became a rule of property, and unless that rule was clearly erroneous, the long-continued adherence to the rule is sufficient ground to regard the question as settled under the well-established doctrine that, in cases of doubt, the executive practice and executive interpretation of the statute will be treated as the true construction. United States *v.* Temple, 105 U. S. 97; 26 L. Ed. 967; Ruggles *v.* Ill., 108 U. S. 526; 27 L. Ed. 812; United States *v.* Graham, 110 U. S. 219; 28 L. Ed. 26; Edwards' Lessee *v.* Darby, 12 Wheat. 206; Brown *v.* United States, 113 U. S. 568; United States *v.* Hill, 120 U. S. 169-182; United States *v.* Healey, 160 U. S. 136.

It is respectfully submitted that the court below did not err in holding that rights to share in the annual distribution of the interest money were conferred upon the lineal decendants of the originally enrolled Indians. Nor did the court below err in holding that respondents were entitled to participate in the division of the principal fund, particularly in view of the fact that the fund has been and is now being distributed in advance of the fifty-year trust period under acts of Congress directing *per capita* payments "to the enrolled Chippewa Indians of Minnesota", and the money-payment rolls form the evidentiary basis under express direction of Congress for all such payments.

III.

Under the third heading (Brf. 22-6) counsel insist that respondents are not "Chippewa Indians" in a

political or racial sense, or in the sense in which these words are used in the Act of 1889, and consequently are not entitled to share in the annual income under Section 7. Chippewa Indian blood flowing from an enrolled ancestor was made the sole muniment of a right to participate in the payments under Section 7. Respondents are conceded by petitioner to be the lineal issue of an enrolled mother and grandmother (R. 21), whose rights as Chippewa Indians have never been questioned. In a proceeding before the Department in which the rights of the four oldest respondents were directly put in issue, it was held (R. 36) that respondents were Chippewa Indians. That determination was final.

The argument then presented as to the tribal character of the fund is based upon the erroneous construction of the Oakes case by the Solicitor in the decision of January 8, 1927, which has hereinbefore been fully considered and need not be here again repeated.

It is further contended by counsel that the Act of June 7, 1897, applies to the respondents, as their father was a white man. That Act was general in its character and related to all tribal Indians and tribal Indian property. It was enacted more than eight years after Congress by the Act of January 14, 1889, had submitted to all the different tribes or bands of Chippewa Indians in Minnesota the *special* plan for the dissolution of their tribal governments and for the distribution of their entire estates, and more than seven years after the plan submitted had been accepted by the

Chippewa Indians in Minnesota and approved by the President.

It is evident that even the Indian Bureau did not consider the Act of June 7, 1897, and the regulations issued thereunder, as applicable to the Chippewa Indians of Minnesota, as no attempt was made to apply the provisions of said Act to the Chippewa Indians of Minnesota until 1916, or nearly 20 years thereafter (R. 22-3). Under the agreements approved March 4, 1890, there was a complete settlement and disposition of all the property of all the different bands or tribes of Chippewa Indians upon express terms. It is very doubtful whether Congress possessed the power subsequent to the agreements to disturb rights that had attached thereunder (Jones *v.* Meehan, 175 U. S. 1), but this question need not be here considered, as it is settled law that a subsequent statute, general in its terms, does not repeal a prior special statute, unless the repeal of the prior special statute is expressly declared in the later general law, or unless the provisions of the general law are manifestly inconsistent with those of the special, neither of which conditions here exist. The uniform rule is declared in Rodgers v. United States (185 U. S. 84, at 87-8), in these words:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the

special—the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special."

IV.

Under this section (Brf. 26-8) counsel admit (27) that the census rolls made by the Commission under the Act of January 14, 1889, were made the original basis for all money payments, but they say that before the Indian Bureau can make a payment of the interest annually accruing under Section 7 it is necessary for the Secretary "to determine what persons, as a class," are "entitled to receive payments." Respondents deny the Secretary possesses such power. The basic right to share in the division of the interest money annually accruing on the principal fund is governed and controlled by Section 7, and that right is fixed and definite, and is beyond the power of the Secretary to alter or change. There is no power in the Secretary to strike the name of an original enrollee from the rolls, except upon death, or fraud practiced in procuring the enrollment. When the issue of an original enrollee are enrolled, there is no power in the Secretary to strike their names from the rolls, except upon death, or for fraud practiced in procuring their enrollment. If it were otherwise, there could be no stability to a right to share in the interest annually

accruing on the fund. The only power possessed by the Secretary to revise the rolls is, before each payment is made, to strike the names of those who have died therefrom, and to add the names thereto of all children found to be lineal issue theretofore born of originally enrolled ancestors, following the uniform practice from March 4, 1890, to January 8, 1927.

When the preceding Secretary found as a fact that respondents were the lineal issue of original enrollees, and identified them as such, his discretion was exhausted, and there remained merely the performance of the ministerial duty of enrolling them and paying them their *per capita* shares in all money payments. The succeeding Secretary possessed no power to strike their names from the rolls and thereby divest them of the right to share in future money payments. United States *ex rel.* Besaw *v.* Work, 6 Fed., 2d Ser., p. 694; Work *v.* United States *ex rel.* Gouin, 18 Fed., 2d Ser., p. 820.

The latter case decided the right of a Minnesota Chippewa Indian, born to tribal membership, and who resided on the White Earth Reservation prior to 1883, when she left the reservation, to a share in the money payments under Section 7 (R. 20), which had been denied her by the Secretary. At page 821 the court below said:

> "It appearing that plaintiff was a Chippewa Indian in Minnesota at the time of the passage of the act of 1889, and entitled to participate in the benefits of that act, the duty of the Secretary to effect payment was merely ministerial. Ballinger *v.* Frost, 216 U. S. 240, 30 S. Ct. 338,

54 L. Ed. 464; Lane *v.* Hoglund, 244 U. S. 174, 37 S. Ct. 558, 61 L. Ed. 1066; Work *v.* Mosier, 261 U. S. 353, 43 S. Ct. 389, 67 L. Ed. 693."

The Secretary's duty under Section 7, particularly in view of the long-continued practice and the express ruling of the Solicitor of February 17, 1919, was ministerial, and the mere fact that the statute invested him with some discretion does not relieve him from the performance of a duty that the statute plainly contemplated he should perform. Lane *v.* Hoglund, 244 U. S., at 182.

Conclusion.

This is a test case designed to determine the rights of Indian children to share in the money payments under Section 7 (R. 20). If birth and continued residence upon a tribal reservation, recognition by a tribal government, and association and affiliation with tribal members are essential prerequisites to a share in the money payments, as held in the Solicitor's opinion of January 8, 1927 (R. 27-51), and now insisted upon by petitioner, then no child born to an original enrolled parent since March 4, 1890, has had any right to share in the distributions that have occurred, or in future distributions, for during said period there have been no tribal reservations and no tribal governments. From March 4, 1890, to January 8, 1927, or for a period of 37 years, the annual interest payments and two-thirds of the principal fund have been disbursed among the original enrollees and their issue, in conformity with the practice that at all times obtained prior to

the Solicitor's opinion of January 8, 1927. During that period several million dollars have been disbursed to the "*issue*" of the original enrollees. If the Solicitor's opinion of January 8, 1927, reversing, as it does, the entire practice theretofore existing, is the law, then a liability would attach to the Government of the United States for the several million dollars heretofore paid to the "issue," and all distributions in the future would be confined to such of the original enrollees as are alive at the time the future payments are made. The disastrous effects of such a ruling must be apparent.

Council for respondents respectfully submit that the judgment of the court below was correct, and should be affirmed.

Respectfully submitted,

WEBSTER BALLINGER,
Attorney for Respondents.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 77.—October Term, 1929.

Ray Lyman Wilbur, Secretary of the Interior, Petitioner, *vs.* United States of America *ex rel.* Mary I. Kadrie, et al.	Certiorari to the Court of Appeals of the District of Columbia.

[April 14, 1930.]

Mr. Justice Van Devanter delivered the opinion of the Court.

This is a petition for a writ of mandamus commanding the Secretary of the Interior to restore the relators to the supplemental rolls of the Chippewa Indians in Minnesota and to pay to each of them a per capita share of all future distributions, whether of interest or principal, made from the fund created under section 7 of the act of January 14, 1889, c. 24, 25 Stat. 642.

The writ was denied by the Supreme Court of the District of Columbia, but that ruling was reversed by the Court of Appeals, 30 Fed. (2d) 989, and the matter is here for review on certiorari.

When the act of ~~1889~~ was passed the Chippewa Indians in Minnesota comprised eleven bands or tribes occupying ten distinct reservations in that State in virtue of treaties or executive orders. Collectively they were regarded as a single tribe and commonly called Chippewas of Minnesota.[1] They numbered about 8,300 1889

[1]These Indians formerly were part of the Chippewa or Ojibway Nation of the Great Lakes region. The Nation comprised many subordinate bands or tribes, some of which came to be permanently located in Canada and others in Michigan, Wisconsin, Minnesota and perhaps other States. The bands or tribes which came to be seated in Minnesota have latterly been designated as the Chippewas of Minnesota by way of distinguishing them from those seated elsewhere. Treaties, September 24, 1819, 7 Stat. 203; June 16, 1820, 7 Stat. 206; August 5, 1826, 7 Stat. 290; July 29, 1837, 7 Stat. 536; October 4, 1842, 7 Stat. 591; February 22, 1855, 10 Stat. 1165; March 11, 1863, 12 Stat. 1249; October 2, 1863, 13 Stat. 667; May 7, 1864, 13 Stat. 693; March 19, 1867, 16 Stat. 719; House Doc. Vol. 61, 59th Cong., 1st Sess. pp. 277-280; History of Ojibway Nation, Copway, pp. 170-171; Minn. His. Soc. Cols., Vol. 5, pp. 37-40, 507-509; also, Vol. IX, pp. 55-56.

and their reservations contained approximately 4,700,000 acres. They were tribal Indians, under the guardianship of the United States, and held their reservations as tribal lands. The act of 1889 was directed to accomplishing their transition from the existing tribal relation and dependent wardship to full individual emancipation with its incident rights and responsibilities; and to that end the act made provision for obtaining, through a commission, a cession of all of their tribal lands save portions of the White Earth and Red Lake reservations needed for allotments; for using the unceded lands in making allotments in severalty, which were to be held subject to prescribed restrictions against alienation, encumbrance and taxation during a period of twenty-five years, or longer if the President so directed; and for selling the ceded lands and creating with the net proceeds an interest-bearing fund, which was to be held in the United States Treasury and expended for the benefit of the Indians as will appear later on.

The act required that the cession have the assent of two-thirds of the male adults and have the approval of the President; directed that the commission obtaining the cession make a census roll of each band or tribe as a guide in ascertaining whether the requisite number of Indians assented to the cession and in making contemplated allotments and payments; required, with exceptions not here material, that the Indians other than those on the Red Lake Reservation be removed to the White Earth Reservation, there to receive allotments; and directed that, after the completion of necessary preliminaries, allotments be made to all of the Indians as soon as practicable.

The contemplated cession was obtained from the Indians and was approved by the President March 4, 1890. The intended census rolls were made and transmitted to the Secretary of the Interior. Several provisions of the act have now been fully executed and others are still in process of administration. The fund created from the proceeds of the sale of the ceded lands is a large one; and the relators here are asserting a right to share in all future distributions therefrom.

The provisions governing the creation and use of that fund are embodied in section 7 of the act and are here quoted at length—those which the parties emphasize being put in italics.

"Sec. 7. That all money accruing from the disposal of said lands in conformity with the provisions of this act shall, after deducting all the expenses of making the census, of obtaining the cession and relinquishment, of making the removal and allotments, and of completing the surveys and appraisals, in this act provided, be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which shall draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, after the allotments provided for in this act have been made, and which interest and permanent fund shall be expended for the benefit of said Indians in manner following: *One half of said interest shall, during the said period of fifty years, except in the cases hereinafter otherwise provided, be annually paid in cash in equal shares to the heads of families and guardians of orphan minors for their use; and one-fourth of said interest shall, during the same period and with the like exception, be annually paid in cash in equal shares per capita to all other classes of said Indians; and the remaining one-fourth of said interest shall, during the said period of fifty years, under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit; and at the expiration of the said fifty years, the said permanent fund shall be divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares: Provided,* that Congress may, in its discretion, from time to time, during the said period of fifty years, appropriate, for the purpose of promoting civilization and self-support among the said Indians, a portion of said principal sum, not exceeding five per centum thereof. The United States shall, for the benefit of said Indians, advance to them as such interest as aforesaid the sum of ninety thousand dollars annually, counting from the time when the removal and allotments provided for in this act shall have been made, until such time as said permanent fund, exclusive of the deductions hereinbefore provided for, shall equal or exceed the sum of three million dollars, less any actual interest that may in the meantime accrue from accumulations of said permanent fund; *the payments of such interest to be made yearly in advance, and, in the discretion of the Secretary of the Interior, may, as to three-fourths thereof, during the first five years be expended in procuring live-stock, teams, farming implements, and seed for such of the Indians to the extent of their shares as are fit and desire to engage in farming, but as to the rest, in cash;* and whenever said permanent fund shall exceed the sum of three million dollars the United States shall

be fully reimbursed out of such excess, for all the advances of interest made as herein contemplated and other expenses hereunder."

In the negotiations resulting in the cession the commission construed the clauses providing for annual payments of one-half of the interest "in equal shares to the heads of families and guardians of orphan minors" and of one-fourth of the interest "in equal shares per capita to all other classes of said Indians" as meaning that three-fourths of the interest should be paid annually to the Indians in equal shares per capita; and the Secretary of the Interior, in laying the cession before the President for his approval, pronounced that construction reasonable and declared it should be adhered to. H. R. Ex. Doc. No. 247, 51st Cong., 1st Sess., pp. 5-6, 24. For several years payments under those clauses were made on that basis. Then the Secretary of the Treasury submitted to the Comptroller the question whether that basis of payment properly could be continued; and the Comptroller, after observing that the clauses were obscurely worded, ruled that the construction given to them by the commission had become the true construction through its adoption in actual practice, and should be respected accordingly. 3 Comp. Dec. 158. All subsequent payments have been made, as the prior ones were, in accordance with that construction.

Manifestly some preliminary steps would need to be taken before the interest annuities could be rightly paid. The number of Indians entitled to participate would need to be ascertained so that the per capita share to be paid to each could be calculated; and those so entitled would need to be listed so that the paying tellers would know whom to pay. From the beginning these practical needs have been met by taking the commission's census rolls as a primary guide, eliminating the names of Indians dying after those rolls were made, making supplemental rolls of Indians erroneously omitted from the census rolls and of Indian children entitled to participate but born after the census was taken, and using the two sets of rolls —appropriately brought up to date and made to include only persons in being at the time—as a correct basis for the necessary calculation and listing.

This general statement will open the way for a better appreciation of the special facts and contentions in the present case.

Mary Blair, a full-blood Chippewa woman, was a member of the White Earth band in Minnesota and as such was included in the census rolls and given an allotment on the White Earth Reservation. Sarah Cogger, a daughter of Mary Blair, is of mixed Chippewa and white blood. She was born in 1892, after the census rolls were made, was enrolled on the supplemental rolls soon after her birth, and was recognized as a member of the White Earth band up to the time of her marriage. In 1909 she was married to Mall Kadrie, a Syrian by birth but a naturalized citizen of the United States. After her marriage she abandoned her tribal relations and ever since has resided with her husband among white people—for several years in Canada and Syria and during the later years at International Falls and St. Paul in Minnesota. She was paid a per capita share in all interest annuities distributed after her enrollment and before her abandonment of the tribal relations, and has received a like share in all subsequent annuities—these later payments to her being in accord with the statutes which save to such an Indian her personal right to share in annuities, tribal funds, etc., as though her tribal relations were maintained.[2]

The nine relators are minor children of Sarah and Mall Kadrie and were born—the first four in Canada and the others at International Falls and St. Paul in Minnesota—after their mother had abandoned her tribal relations and was permanently residing with her husband among white people. So, while all of the relators have a minor fraction of Minnesota Chippewa blood, they were born of parents having no tribal relations then or since and have lived only in white communities.

At their mother's request, following their respective births, the first three of these children were placed on the supplemental rolls and shared in some of the interest annuities. A like request on behalf of the fourth child led to an inquiry which brought attention to the mother's marriage to a white man, her abandonment of the tribal relations and the birth of the four children in Canada where the parents were then residing. With these facts before it the Indian Bureau, in 1916, declined to enroll the fourth child and cancelled the prior enrollment of the first three. Paragraph 4 of

[2]Acts March 3, 1875, c. 131, § 15, 18 Stat. 420; February 8, 1887, c. 119, § 6, 24 Stat. 390; August 9, 1888, c. 818, § 2, 25 Stat. 392.

section 324 of the Regulations of the Indian Bureau, as amended April 1, 1905, was cited as the applicable administrative rule in such matters. That paragraph reads:

"All children born to annuitants either before or since the last preceding payment, who have not already been enrolled, should be enrolled with their parents. This includes cases where the mother is an Indian woman married to a white man, and such woman and her issue are recognized by the tribe as belonging thereto, and where the family so founded identifies itself and affiliates with the tribe of which the mother is a recognized member. When an Indian woman by her marriage with a white man has, in effect, withdrawn from the tribe and is no longer identified with the tribal community and interests, the offspring of such a marriage are not entitled to share in annuities or other benefits as Indians and must not be enrolled."

In 1919 the Secretary of the Interior, following an opinion given by the Solicitor for that Department, ruled that Mrs. Kadrie's children were entitled to share in the interest annuities. The children born up to that time were then placed on the supplemental rolls, and those born thereafter were enrolled soon after birth. All then shared for a time in the annuities. In 1927 a succeeding Secretary of the Interior, adopting and applying an opinion given by a succeeding Solicitor, held that these children were not entitled to share in the interest annuities, and accordingly directed that their enrollment be cancelled and no further payment be made to them.

The two Solicitors differed sharply. The first was of opinion that the act of 1889 should be construed and given effect as if it were a conventional deed of trust; and with this as a premise he concluded that the fund established under section 7 is not a tribal fund but one held for designated Indian beneficiaries as individuals, and that the beneficiaries comprise, first, all Indians now living who were included in the census rolls as members of the tribe, and, secondly, all living lineal descendants of any Indian so enrolled, regardless of whether the descendant is or ever was a member and even though he was born of parents neither of whom was a member at the time. And as the Kadrie children are lineal descendants (grandchildren) of Mary Blair, who was included in the census rolls as a member, that Solicitor regarded them as entitled to share

in the distributions.[3] The second Solicitor was of opinion that the act is to be construed and given effect as an exertion by Congress of its authority over the affairs and property of tribal Indians under the guardianship of the United States; that the fund established under section 7 is a tribal fund derived from the sale of tribal lands, and is held and being administered as such by the United States; that the tribe has not been dissolved but is recognized by Congress as still existing; that in this situation the right to share in the interest annuities depends upon existing tribal membership, save in exceptional instances where Congress has provided otherwise; and that the Kadrie children, all of whom were born of a white father and after their mother had separated from the tribe and was permanently living among white people, are without tribal membership and not within any exceptional provision permitting other than existing members to share in such annuities. This Solicitor rested his opinion in part upon the general rule that, in the absence of provision to the contrary, the right of individual Indians to share in tribal property, whether lands or funds, depends upon tribal membership, is terminated when the membership is ended, and is neither alienable nor descendible.[4]

In the present petition the relators assert that the decision of the Secretary of the Interior in 1927, although given after notice and hearing, is void in that the then Secretary was without power to reconsider and revoke the decision of his predecessor in 1919 on the

[3]The Solicitor said:

"The ancestor must be found to have been of the tribal membership at the time of the creation of the trust. . . . His descendants (whether children or grandchildren) take an interest, not as tribal members, but as of the ancestor's blood; his blood entitling him and them alike, because it was tribal blood".

Also:

"Sarah Kadrie and her children are 'issue' of her mother, a full-blood Chippewa Indian duly enrolled, and as such they will be entitled, at the expiration of the trust period, to share in the distribution of the trust fund; and meanwhile they are equally entitled to share in the annuities arising from that fund. Those rights they have not forfeited either by acquiring foreign citizenship or by abandoning, or failing to acquire, residence on the Indian reservation or with the tribe."

[4]Cherokee Nation *v.* Hitchcock, 187 U. S. 294, 307; Gritts *v.* Fisher, 224 U. S. 640, 642; Sizemore *v.* Brady, 235 U. S. 441, 446; La Roque *v.* United States, 239 U. S. 62, 66; Oakes *v.* United States, 172 Fed. 304, 307.

same matter; and they further assert that the decision in 1927 is otherwise wrong in that it rests upon untenable rulings to the effect that the fund established under section 7 is a tribal fund and is held and being administered as such by the United States, that the tribe has not been dissolved, and that the right to share in the annuities from the fund is confined to members of the tribe, save in exceptional instances which do not include the relators. Upon these grounds the relators seek a writ of mandamus directing, in substance, that the Secretary of the Interior put aside the decision of 1927 and restore and give effect to that of 1919.

If at the time of the decision in 1927 the Secretary of the Interior was without power to reconsider and revoke the decision of 1919, it well may be that the relators would be entitled to the relief by mandamus which they seek.[5] But there was no such want of power. The decision in 1919 was, not a judgment pronounced in a judicial proceeding, but a ruling made by an executive officer in the exertion of administrative authority. That authority was neither exhausted nor terminated by its exertion on that occasion, but was in its nature continuing. Under it the Secretary who made the decision could reconsider the matter and revoke the decision if found wrong; and so of his successor. The latter was charged, no less than the former had been, with the duty of supervising the payment of the interest annuities and of causing them to be distributed among those entitled to them and no others; and if he found that individuals not so entitled were sharing in the annuities by reason of a mistaken or erroneous ruling of the former his authority to revoke that ruling and stop further payments under it was the same as if it had been his own act.[6] The powers and duties of such an office are impersonal and unaffected by a change in the person holding it.

The case of *United States* v. *Atkins*, 260 U. S. 220, relied on by the relators, is not in point. It involved an enrollment by a special

[5]United States v. Schurz, 102 U. S. 378, 402-403; Noble v. Union River Logging R. R., 147 U. S. 167, 171; Garfield v. Goldsby, 211 U. S. 249, 261-262.

[6]West v. Standard Oil Co., 278 U. S. 200, 210; Beley v. Naphtaly, 169 U. S. 353, 364; Knight v. U. S. Sand Association, 142 U. S. 161, 181-182; New Orleans v. Paine, 147 U. S. 261, 266; Greenameyer v. Coate, 212 U. S. 434, 442; Parcher v. Gillen, 26 L. D. 34, 43; Aspen Consolidated Mining Co. v. Williams, 27 L. D. 1, 10-11. And see Pearsons v. Williams, 202 U. S. 281, 284-285.

commission under a statute providing that the enrollment when approved by the Secretary of the Interior should be "final" and entitle the person enrolled to an allotment. The Secretary approved and in usual course an allotment was made and a patent issued. Thereafter the enrollment was drawn in question in a suit brought to cancel the patent. This Court held that the statute was intended to make the enrollment when approved by the Secretary conclusive of the individual's existence, membership, etc., and unimpeachable except for such fraud or mistake as would afford ground for avoiding a judgment in adversary proceedings. There is no like provision in the act of 1889. Nor does it contain any mention of supplemental rolls. They are administrative devices intended to safeguard and facilitate the distribution of the annuities. No doubt they are intended to be evidential of the right to share therein, but there is no basis for holding them conclusive or not subject to revision.

As the decision of the Secretary in 1927 was made in the exercise of lawful authority, it becomes necessary to examine the complaint that the decision on the merits is wrong. In doing so there is need for having in mind the limited scope of the remedy here invoked.

Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.[7]

The duties of executive officers, such as the Secretary of the Interior, usually are connected with the administration of statutes which must be read and in a sense construed to ascertain what is required. But it does not follow that these administrative duties all involve judgment or discretion of the character intended by the rule just stated. Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that

[7]Commissioner of Patents v. Whiteley, 4 Wall. 522, 534; United States ex rel. v. Black, 128 U. S. 40, 48; Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324-325; Louisiana v. McAdoo, 234 U. S. 627, 633; Interstate Commerce Commission v. Waste Merchants Ass'n, 260 U. S. 32, 34.

its performance may be compelled by mandamus, unless there be provision or implication to the contrary.[8] But where the duty is not thus plainly prescribed but depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.[9]

A reference to three of the cases just cited will serve to illustrate the application of this doctrine in instances where mandamus is sought for the purpose of controlling a Secretary in the discharge of duties of the latter class. In *Riverside Oil Co.* v. *Hitchcock* mandamus was sought as a means of compelling the Secretary of the Interior to retract a decision theretofore given and to make another along different lines. This Court, after pointing out that the Secretary's duty in the matter was not formal or ministerial, said: "The court has no general supervisory power over the officers of the Land Department, by which to control their decisions upon questions within their jurisdiction. If this writ were granted we would require the Secretary of the Interior to repudiate and disaffirm a decision which he regarded it his duty to make in the exercise of that judgment which is reposed in him by law, and we should require him to come to a determination upon the issues involved directly opposite to that which he had reached, and which the law conferred upon him the jurisdiction to make. Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gave him the power and imposed upon him the duty to decide for himself. The writ never can be used as a substitute for a writ of error. Nor does the fact that no writ of error will lie in such a case as this, by which to review the judgment of the Secretary, furnish any foundation for the claim that mandamus may therefore be awarded." In *Knight* v. *Lane*, where a proposed adjustment of a controversy between Indians over an allotment had

[8]Roberts v. United States, 176 U. S. 221, 231; Lane v. Hoglund, 244 U. S. 174, 181; Work v. McAlester-Edwards Co., 262 U. S. 200, 208; Work v. Lyon, 266 U. S. 161, 168, *et seq.*; Wilbur v. Krushnic, decided January 6, 1930.

[9]Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324-325; Ness v. Fisher, 223 U. S. 683, 691; Knight v. Lane, 228 U. S. 6, 13; Lane v. Mickadiet, 241 U. S. 201, 208, 209; Alaska Smokeless Coal Co. v. Lane, 250 U. S. 549, 555; Hall v. Payne, 254 U. S. 343, 347; Work v. Rives, 267 U. S. 175, 183-184. And see United States ex rel. v. Hitchcock, 205 U. S. 80, 86.

been approved by the Secretary in one decision and afterwards disaproved in another, it was said: "Inasmuch as the decision of the Secretary revoking his prior approval of the proposed adjustment was not arbitrary or capricious, but was given after a hearing and in the exercise of a judgment and discretion confided to him by law, it cannot be reviewed, or he be compelled to retract it, by mandamus." And in *Lane* v. *Mickadiet* mandamus was sought as a means of preventing the Secretary from reconsidering, after notice and hearing, a prior decision determining who were the heirs of a deceased Indian and sustaining the Indian's adoption of a child not related to him. The mandamus was refused on the ground that the Secretary's judgment and discretion in determining such heirships could not be thus controlled; and in disposing of an argument similar to one which is advanced here the court said: "But it is said that the purpose of the statute was to give the recognized heir a status which would entitle him to enjoy the allotted land and not to leave all his rights of enjoyment open to changing decisions which might be made during the long period of the trust term and thus virtually destroy the right of property in favor of the heir which it was the obvious purpose of the statute to protect. But in the last analysis this is a mere argument seeking to destroy a lawful power by the mere suggestion of a possible abuse."

It is apparent that, with the question of the Secretary's authority resolved against the relators, the only question open in this proceeding is whether the decision of 1927 was given in the discharge of a ministerial duty controllable by mandamus or of a duty requiring the exercise of judgment or discretion not thus controllable.

The questions mooted before the Secretary and decided by him were whether the fund is a tribal fund, whether the tribe is still existing and whether the distribution of the annuities is to be confined to members of the tribe, with exceptions not including the relators. These are all questions of law the solution of which requires a construction of the act of 1889 and other related acts. A reading of these acts shows that they fall short of plainly requiring that any of the questions be answered in the negative and that in some aspects they give color to the affirmative answers of the Secretary. That the construction of the acts insofar as they have a bearing on the first and third questions is sufficiently uncertain to involve the

exercise of judgment and discretion is rather plain. The second question is more easily answered, for not only does the act of 1889 show very plainly that the purpose was to accomplish a gradual rather than an immediate transition from the tribal relation and dependent wardship to full emancipation and individual responsibility, but Congress in many later acts—some near the time of the decision in question—has recognized the continued existence of the tribe.[10] This recognition was respected by the Secretary and is not open to question here.[11] With the tribe still existing the criticism by counsel for the relators of the Secretary's decision in other particulars loses much of its force.

The time fixed for the final distribution is as yet so remote that no one is now in a position to ask special relief or direction respecting that distribution.

From what has been said it follows that the case is not one in which mandamus will lie.

Judgment of Court of Appeals reversed.
Judgment of Supreme Court affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[10]Acts of August 1, 1914, c. 222, 38 Stat. 592; May 18, 1916, c. 125, 39 Stat. 135; March 2, 1917, c. 146, 39 Stat. 979; May 25, 1918, c. 86, 40 Stat. 572; June 30, 1919, c. 4, 41 Stat. 14; February 14, 1920, c. 75, 41 Stat. 419; November 19, 1921, c. 135, 42 Stat. 221; January 30, 1925, c. 114, 43 Stat. 798; February 19, 1926, c. 22, 44 Stat., P. 2, 7; March 4, 1929, c. 705, 45 Stat. 1584.

[11]United States v. Holiday, 3 Wall. 407, 419; United States v. Rickert, 188 U. S. 432, 445; Tiger v. Western Investment Co., 221 U. S. 286, 315.